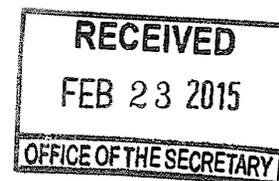


UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-16293



In the Matter of

LAURIE BEBO and  
JOHN BUONO, CPA,

Respondents.

The Honorable Cameron Elliot,  
Administrative Law Judge

**MILBANK TWEED HADLEY & MCCLOY LLP'S MOTION TO QUASH NON-PARTY  
SUBPOENA *DUCES TECUM* ISSUED AT THE REQUEST OF RESPONDENT  
LAURIE BEBO**

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Pursuant to Rule 232(e) of the Commission's Rules of Practice, 17 C.F.R. § 201.232(e), and the Court's February 10, 2015 Order extending the time to respond, non-party Milbank Tweed Hadley & McCloy LLP ("Milbank") respectfully moves to quash the Subpoena *Duces Tecum* issued at the request of Respondent Laurie Bebo ("Milbank Subpoena") for the reasons set forth herein. The Milbank Subpoena is annexed hereto as Exhibit A.

### **INTRODUCTION**

This administrative proceeding is brought by the Division of Enforcement (the "Division") against Laurie Bebo ("Bebo"), the former Chief Executive Officer of Assisted Living Concepts, Inc. ("ALC" or the "Company"), and John Buono ("Buono"), ALC's former Chief Financial Officer. On January 23, 2015, the Court granted Bebo's request for issuance of subpoenas *duces tecum* to, among other non-parties, Milbank, which previously served as outside counsel to the Audit Committee of ALC's Board of Directors (the "Audit Committee") and to ALC's Board of Directors as a whole in connection with (among other representations) an internal investigation conducted by the Company relating to events that are now at issue in this administrative proceeding. Milbank also previously served as outside counsel to the Company and to its individual directors in connection with a separate SEC investigation relating to these events. In November 2013, Milbank's representations in the foregoing (and other) matters concluded. Milbank has no current role with any of the parties related to this matter.

Discovery under the Commission's Rules of Practice is "limited" in comparison to discovery under the Federal Rules of Civil Procedure.<sup>1</sup> The Milbank Subpoena, however, does not contemplate "limited" discovery. Rather, the Milbank Subpoena contains fifteen requests

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<sup>1</sup> *David F. Bandimere*, Administrative Proceedings Rulings Release No. 746, 2013 SEC LEXIS 399, at \*11 (Feb. 5, 2013) (Elliot, A.L.J.) (citing *Steven E. Muth*, Securities Act Release No. 8622, 2005 SEC LEXIS 2488 (Oct. 3, 2005)).

that seek documents generally falling into two broad categories: (i) documents relating to the collection, preservation, transfer and disposition of materials Bebo prepared and maintained during her employment with ALC, including in particular Bebo's legal pads with handwritten notes ("Bebo's Notepads") and three-ring binders containing copies of materials provided to ALC's directors in connection with their meetings ("Bebo's Board Books"), and (ii) documents relating to Milbank's representation of ALC's Board of Directors and Audit Committee during the Company's internal investigation and its representation of ALC during the SEC investigation.

These requests are improper. The vast majority of documents potentially responsive to the Milbank Subpoena are (1) documents protected from disclosure by the attorney-client privilege and/or work product doctrine, (2) documents ALC produced to the Division during the SEC investigation and thus available to Bebo directly from the Division (or already in Bebo's possession), and/or (3) non-privileged documents available from ALC. Moreover, in prior legal proceedings brought against the Company by Bebo, the Company produced hundreds of thousands of pages of documents to Bebo, including, in response to allegations of spoliation rejected by a hearing officer in one of those proceedings but reasserted by Bebo here, every Bebo legal pad that ALC could locate. Because the documents requested by Bebo are shielded from discovery, are more appropriately sought from others or are already in Bebo's possession, and because of the limited nature of permitted discovery in this type of proceeding (particularly from a third party like Milbank), we request that the Milbank Subpoena be quashed.

## **BACKGROUND**

The Commission commenced this proceeding against Bebo and Buono on December 3, 2014.<sup>2</sup> The Division alleges that from 2009 through early 2012, Bebo and Buono undertook a scheme to hide ALC's lack of compliance with certain occupancy and financial covenants in an agreement governing ALC's lease of certain senior residence facilities it operated, all the while certifying the accuracy of representations in ALC's Forms 10-K and 10-Q that ALC was in compliance with the lease covenants. *See* Order Instituting Proceedings ¶¶ 1-2, 6 (Dec. 3, 2014). Bebo and Buono executed the scheme allegedly by directing ALC personnel to include fabricated occupants when making and recording calculations regarding compliance with the covenants, such that occupancy numbers and revenues at the facilities would be higher. *See id.* ¶

3. The Division alleges that the purpose of the fraudulent scheme was to avoid an ALC default under the lease agreement, which would have permitted the landlord of the properties, Ventas, Inc. ("Ventas"), to terminate the lease agreement and seek accelerated rent payments between \$16 million and \$25 million. *See id.* ¶ 2. The scheme allegedly unraveled beginning in April 2012 when, in settlement discussions following Ventas's filing of a lawsuit against ALC unrelated to the lease covenants, ALC sought a release from Ventas relating to the inclusion of employees in the lease covenant calculations, and Ventas thereafter moved to amend its complaint against ALC to include allegations relating to these practices. *See id.* ¶¶ 51-53.

In May 2012, the Audit Committee of ALC's Board of Directors retained Milbank to represent it in connection with the Company's internal investigation regarding certain lease disclosures by the Company. *See* Ex. B, Letter from Daniel M. Perry, Milbank, to Scott Tandy, Senior Attorney, SEC, at 2 (Mar. 4, 2014). In July 2012, after Bebo's removal from ALC's

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<sup>2</sup> Buono has since agreed to settle the proceedings instituted against him by the Commission. *See Laurie Bebo*, Exchange Act Release No. 74177, 2015 SEC LEXIS 347 (Jan. 29, 2015).

Board of Directors and termination from employment with ALC, Milbank's representation with respect to the internal investigation extended to the ALC Board of Directors as a whole. *See id.* In addition, beginning in June 2012, Milbank was retained to represent ALC—the Company as a whole—in an investigation by SEC staff. *See id.* Moreover, Milbank represented the individual members of ALC's Board of Directors (the "Individual Directors") in connection with the SEC investigation in 2012 and 2013. *See id.* at 4. Between June 2012 and November 2013, ALC, with Milbank's assistance, produced over 40,000 documents to the SEC in response to requests by SEC staff.

Milbank also represented the Company and the Individual Directors in various actions filed against the Company in 2012 and 2013, including actions brought against the Company by Bebo. *See id.* at 2-4.<sup>3</sup> One of these actions was an arbitration proceeding Bebo commenced against the Company in June 2012, in which Bebo disputed the existence of "cause" for her termination and alleged that she was entitled to more than \$2.4 million in severance pay and other termination benefits because her termination was without cause. *See* ALC, Quarterly Report (Form 10-Q), at 40 (Nov. 8, 2012).<sup>4</sup> In July 2012, Bebo filed a complaint against the Company with the Department of Labor's Occupational Safety and Health Administration ("OSHA"), alleging wrongful termination. *See id.*

The history of Bebo's litigation with ALC is relevant to the Court's consideration of this motion to quash. In the course of the arbitration and OSHA proceedings, Bebo made several requests for production of documents, and received, in total, more than 48,000 documents containing over 300,000 pages from ALC, including *every* document that ALC had produced to

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<sup>3</sup> Milbank also defended the Individual Directors at depositions in legal actions brought against the Company by Bebo. *See* Ex. B at 3-4.

<sup>4</sup> Available at <http://www.sec.gov/Archives/edgar/data/929994/000114036112046279/form10q.htm>.

the SEC through late August 2013, as well as every legal pad with Bebo's handwritten notes that ALC could locate.<sup>5</sup> In the arbitration, Bebo accused ALC of spoliation and requested sanctions, alleging that "hundreds" of notepads containing her handwritten notes were missing from ALC's production. *See* Ex. C, Letter from Christopher P. Banaszak, Reinhart Boerner Van Deuren s.c., to Steven L. Gillman, Esq., Am. Arbitration Ass'n, at 4 (Aug. 26, 2013). After receiving and considering submissions on these issues, *see* Ex. D, Letter from Thomas A. Arena, Milbank Tweed Hadley & McCloy LLP, to Steven L. Gillman, Esq., Am. Arbitration Ass'n (Aug. 28, 2013), the arbitrator declined to find that any spoliation had occurred and denied Bebo's request for sanctions.

In November 2013, Milbank's representation of ALC, the Board of Directors, the Audit Committee, and the Individual Directors concluded. *See* Ex. B at 2-4. Thereafter, Milbank provided ALC's successor counsel, Ropes & Gray LLP ("Ropes & Gray"), documents in Milbank's possession relating to Milbank's prior engagements for the Company and its directors.

On January 14, 2015, following the commencement of this administrative proceeding, Bebo filed with this Court a request for issuance of subpoenas *duces tecum* to Milbank, ALC, Ventas, and Quarles & Brady LLP. *See* Ex. E, Resp't Laurie Bebo's Request for Issuance of Subpoenas *Duces Tecum* (Jan. 14, 2015). On January 23, 2015, this Court granted in part Bebo's request (as modified) and authorized the issuance of the Milbank Subpoena. *See* Order on Request for Issuance of Subpoenas (Jan. 23, 2015).

The Milbank Subpoena seeks fifteen categories of documents. *See* Ex. A at 4-8. The documents sought generally fall into two broad types:

- Requests One through Six seek documents relating to the collection, preservation, transfer and disposition of materials Bebo prepared and maintained during her

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<sup>5</sup> Discovery in the arbitration matter was coordinated with discovery in the OSHA proceeding, with the result that discovery was supervised by both the arbitrator and the OSHA hearing officer.

employment with ALC, including Bebo's Notepads and Bebo's Board Books. *See id.* at 4-5.

- Requests Seven through Fifteen seek documents relating to the internal investigation conducted by Milbank at the direction of ALC's Board of Directors and Audit Committee and Milbank's representation of ALC during the SEC investigation. *See id.* at 6-8.

On February 10, 2015, this Court granted Milbank's motion for an extension of time through February 20, 2015 to respond to the Milbank Subpoena.

### **ARGUMENT**

Discovery under the Commission's Rules of Practice is "limited" in comparison to discovery under the Federal Rules of Civil Procedure. *Bandimere*, 2013 SEC LEXIS 399, at \*11 (citing *Muth*, 2005 SEC LEXIS 2488). The Commission's Rules of Practice "do not allow large-scale and time consuming pre-trial discovery similar to that conducted under the [Federal Rules of Civil Procedure]," *Raymond James Fin. Servs., Inc.*, File No. 3-11692, at 10 (Dec. 23, 2004),<sup>6</sup> and a respondent in an SEC administrative proceeding "is not entitled to conduct a fishing expedition ... in an effort to discover something that might assist [her] in [her] defense, or in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory," *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at \*60 n.54 (Jan. 30, 2009) (citations and quotation marks omitted). Nor may a respondent obtain production of privileged documents. *Putnam Inv. Mgmt.*, Administrative Proceedings Rulings Release No. 613, 2004 SEC LEXIS 1096, at \*5-6 (Mar. 26, 2004) (noting that the Commission and its administrative law judges will deny requests for privileged documents). Under Rule 232, subpoenas like Bebo's that are unreasonable, oppressive, excessive in scope, or unduly burdensome should be quashed. 17 C.F.R. § 201.232(b), (e)(2).

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<sup>6</sup> Available at <http://www.sec.gov/alj/aljorders/2004/3-11692-1.pdf>.

Bebo well knows that the contents of her office following her termination were under the control of ALC, not Milbank. Given the breadth of ALC's prior productions to Bebo in her legal actions against the Company, and the prior consideration of the allegedly "missing" legal pads, it is clear that Bebo is now seeking the one thing she has not already received, and is not entitled to have: documents that are protected by the attorney-client privilege and/or the work product doctrine. The Milbank Subpoena should be quashed.

**I. THE MILBANK SUBPOENA SHOULD BE QUASHED BECAUSE IT PREDOMINANTLY SEEKS PRIVILEGED OR PROTECTED DOCUMENTS**

The Milbank Subpoena should be quashed because it largely seeks documents that are protected from disclosure under the attorney-client privilege and/or the work product doctrine.

**A. The Attorney-Client Privilege and Work Product Doctrine**

The attorney-client privilege protects confidential communications between clients and their attorneys when the communications are made for the purpose of securing legal advice or services. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014). The privilege shields not only communications made by a client to its attorney, but also communications from an attorney to the client. *A.N.S.W.E.R. Coalition v. Jewell*, 292 F.R.D. 44, 47-48 (D.D.C. 2013).

The work product doctrine, established by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and later codified in Federal Rule of Civil Procedure 26(b)(3), shields from disclosure "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3). The Commission has explained that "[a]lthough Commission administrative proceedings are not governed by the Federal Rules of Civil Procedure, the work product protection provided in Rule 26(b)(3) is consistent with that provided by the rules of most jurisdictions and with the Supreme Court's holding in *Hickman v.*

*Taylor*,” and the Commission has applied Rule 26(b)(3)’s formulation of the work product doctrine in its proceedings. *Clarke T. Blizzard*, 2002 SEC LEXIS 3408, at \*11-12 & n.17 (Apr. 23, 2002). The work product doctrine extends to material that (1) is a document or tangible thing, (2) was prepared in anticipation of litigation, and (3) was prepared by or for a party or its representative. *Astra Aktiebolag v. Andrx Pharm., Inc.*, 208 F.R.D. 92, 104 (S.D.N.Y. 2002). Courts apply a variety of tests in determining whether a document was prepared “in anticipation of litigation,” but in a majority of the Circuits the test is whether the document can be fairly said to have been prepared or obtained “because of” the prospect of litigation. *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004).

**B. The Milbank Subpoena Seeks Privileged or Protected Materials**

The Milbank Subpoena seeks documents relating to Milbank’s representation of ALC’s Audit Committee and ALC’s Board of Directors as a whole in relation to the Company’s internal investigation, and relating to Milbank’s representation of ALC and the Individual Directors in connection with the SEC investigation and legal actions brought by Bebo and others. But the vast majority of documents sought by the Milbank Subpoena are protected from disclosure by the attorney-client privilege and/or work product doctrine. We have categorized below each of the categories of requests with the authority protecting the requested documents from disclosure in litigation.

**1. Milbank Interview Notes, Memoranda, and Summaries from the Internal Investigation (RFPs 8-9)**

Request Eight of the Milbank Subpoena seeks “notes, memoranda, or summaries” of Milbank’s interviews of witnesses during the course of ALC’s internal investigation. *See Ex. A* at 6. Similarly, Request Nine seeks “documents reflecting statements by” the witnesses enumerated in the request “made to Milbank or anyone acting on Milbank’s behalf in the course

of the Internal Investigation.” *See id.* Courts have routinely held that such documents are “classic, core work product” because they reflect counsel’s thoughts and mental impressions of what was important in the interviews. *In re Cardinal Health, Inc. Sec. Litig.*, 2007 WL 495150, at \*6 (S.D.N.Y. Jan. 26, 2007) (holding that interview memoranda, summaries, and exhibits were protected work product); *see also SEC v. Schroeder*, 2009 WL 1125579, at \*5-8 (N.D. Cal. Apr. 27, 2009) (holding that attorneys’ notes from interviews conducted during investigation of client and memoranda of the interviews were protected work product), *objections overruled*, 2009 WL 1635202 (N.D. Cal. June 10, 2009); *Chamberlain Mfg. Corp. v. Maremont Corp.*, 1993 WL 11885, at \*2 (N.D. Ill. Jan. 19, 1993) (holding that notes, memoranda, and summaries of interviews conducted by outside counsel in an internal investigation were protected work product and constituted “the very essence of what is protected by the work product doctrine”).

**2. Milbank Legal Advice Regarding Statement in ALC’s Form 10-Q Concerning the Internal Investigation (RFPs 7, 10)**

Requests Seven and Ten seek from Milbank documents supporting, reflecting or referring to a statement in ALC’s Form 10-Q for the quarter ending September 30, 2012 that the Board of Directors’ internal investigation had been completed and that the Board had decided not to take any action. *See Ex. A* at 6-7. Because Milbank advised ALC’s Board of Directors and its Audit Committee with respect to these disclosures, these requests necessarily call for Milbank’s production of communications between Milbank and the Board of Directors or the Audit Committee. Milbank’s communications with ALC’s Board of Directors or its Audit Committee relating to the Company’s internal investigation were confidential and were made with the purpose of providing legal advice. As such, they are plainly shielded by the attorney-client privilege. *In re BCE W., L.P.*, 2000 WL 1239117, at \*2 (S.D.N.Y. Aug. 31, 2000) (holding that

confidential communications between board committee and its outside counsel were protected by attorney-client privilege).

**3. Milbank Documents Relating to Any Legal Conclusions Concerning the Internal Investigation (RFP 11)**

Request Eleven seeks from Milbank reports, memoranda and other documents related to any conclusions of ALC's internal investigation, including documents related to any presentations to ALC's Audit Committee or Board of Directors. *See* Ex. A at 7. Again, by virtue of Milbank's representation of ALC's Audit Committee and Board of Directors in connection with the internal investigation, this request necessarily calls for production of communications between Milbank and the Audit Committee or Board of Directors. These communications are protected by the attorney-client privilege. *BCE*, 2000 WL 1239117, at \*2.

Moreover, any materials prepared by Milbank in connection with its presentations to ALC's Audit Committee or Board of Directors are protected work product. *See, e.g., In re Cardinal Health*, 2007 WL 495150, at \*6 (holding that "presentation binders" of materials collected by outside counsel in internal investigation for use in presentations to audit committee were "squarely covered by the work product doctrine since they represent [outside counsel's] legal analysis, opinions, and mental impressions concerning the issues investigated"); *GenOn Mid-Atl., LLC v. Stone & Webster, Inc.*, 2011 WL 5439046, at \*6 (S.D.N.Y. Nov. 10, 2011) (holding that PowerPoint presentations prepared by company with input from counsel for display to executive committee of board of directors were protected work product).

**4. Milbank Materials Relating to Communications with or Presentations to the SEC and ALC's Outside Auditor (RFPs 11-15)**

Requests Eleven through Fifteen seek documents related to any Milbank presentations to, and discussions with, SEC staff and ALC's outside auditor Grant Thornton in connection with ALC's internal investigation and the SEC investigation, including attorney notes and

presentation materials. *See* Ex. A at 7. We believe that any written communications between Milbank and the SEC would already have been produced in discovery in these proceedings, and most, if not all, that were created prior to late August 2013 would have been produced to Bebo in 2013 as part of discovery in her arbitration and OSHA proceedings against ALC.

The remaining documents sought by these requests are protected from disclosure. The documents related to Milbank's presentations to, and discussions with, the SEC staff are classic attorney work product. *See Dempsey v. Bucknell Univ.*, 296 F.R.D. 323, 331 (M.D. Pa. 2013) (holding that notes made by counsel in preparation for meeting with adversary were protected work product where they were prepared in anticipation of litigation); *In re Cardinal Health*, 2007 WL 495150, at \*6 (holding that "presentation binders" of materials collected by outside counsel in internal investigation for use in presentations to SEC were "squarely covered by the work product doctrine since they represent [outside counsel's] legal analysis, opinions, and mental impressions concerning the issues investigated").

Similarly, documents related to Milbank's communications with ALC's outside auditor, as well as the substance of any such communications, are protected by the work product doctrine. *See Int'l Design Concepts, Inc. v. Saks Inc.*, 2006 WL 1564684, at \*2-3 (S.D.N.Y. June 6, 2006) (holding that documents prepared by outside counsel during internal investigation and provided to outside auditor were protected work product despite disclosure); *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 448 (S.D.N.Y. 2004) (same); *Gutter v. E.I. Dupont de Nemours & Co.*, 1998 WL 2017926, at \*5 (S.D. Fla. May 18, 1998) (same for documents prepared by corporate counsel in litigation and disclosed to outside auditor); *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125, at \*6 (S.D.N.Y. Dec. 23, 1993) (same); *Schroeder*, 2009 WL 1125579, at \*8-9 (noting a split among courts as to whether documents disclosed to an

independent auditor remain protected work product, but stating that “better view” is that outside auditors do not have the “tangible adversarial relationship” requisite for waiver, and holding that documents disclosed to outside auditors were protected work product).

**5. Documents Regarding the Collection, Preservation, Transfer and Disposition of Bebo’s Notepads and Bebo’s Board Books (RFPs 1-6)**

Requests One through Six seek from Milbank documents regarding the collection, preservation, transfer and disposition of Bebo’s Notepads, Bebo’s Board Books, and other Bebo documents. *See* Ex. A at 4-5. These Requests would inherently encompass communications between Milbank and ALC or the Individual Directors, as Milbank counseled ALC and the Individual Directors on these matters in connection with its representations. These communications are protected by the attorney-client privilege.

In addition to being shielded by attorney-client privilege, such communications are protected under the work product doctrine because they reflect instructions of counsel that will reveal Milbank’s formulation of document preservation and production strategy on behalf of ALC during litigation. *See Robinson v. Tex. Auto. Dealers Ass’n*, 214 F.R.D. 432, 456 (E.D. Tex. 2003) (observing that document sent by outside counsel to client giving instructions on document production “would clearly be protected by the work-product doctrine” if not for the objecting party’s failure to establish who received the document), *vacated in part on other grounds sub nom. In re Tex. Auto. Dealers Ass’n*, 2003 U.S. App. LEXIS 27966 (5th Cir. July 25, 2003).

Significantly, the Bebo materials at issue were, according to Bebo, in her office at the time she was fired. The contents of Bebo’s office were thereafter maintained by ALC, not Milbank. *See* Ex. D at 5. As noted above, all legal pads and binders were copied and produced to Bebo in connection with her arbitration and OSHA proceedings against ALC.

Notwithstanding the foregoing, in order to facilitate the presentation of the facts on this subject in an efficient manner, Milbank is willing to provide a declaration explaining the facts its attorneys are aware of related to Bebo's Notepads and Bebo's Board Books. Milbank attempted but was unable to meet and confer with counsel for Bebo in advance of this motion to propose this compromise.

#### **6. Internal Milbank Communications (RFPs 1-15)**

The documents requested in the Milbank Subpoena, on their face, encompass the vast internal communications between Milbank attorneys (and between Milbank attorneys and Milbank staff and legal assistants) generated in connection with Milbank's lengthy representation in the Company's internal investigation, the SEC investigation, and the legal actions brought by Bebo and others. While it is not clear to us that Bebo is actually seeking such communications, it is well-established that such internal communications are "broadly protected" under the work product doctrine. *See, e.g., Perkins v. Fed. Fruit & Produce Co.*, 2011 WL 6937195, at \*2 (D. Colo. Dec. 30, 2011) (holding that communications between attorneys for a workers' union discussing matters relating to a charge of discrimination were protected work product).

\* \* \*

Because the vast majority of the documents sought by the Milbank Subpoena are attorney-client communications and/or are documents prepared in anticipation of litigation, the Milbank Subpoena is unduly burdensome, unreasonable, and should be quashed. *See Rita J. McConville*, File No. 3-11330 (Mar. 17, 2004), available at <http://www.sec.gov/alj/aljorders/2004/3-11330.pdf> (granting motion to quash where SEC staff established that requested documents were protected by attorney-client privilege).

**C. There Has Been No Waiver with Respect to the Privileged or Protected Materials Sought by the Milbank Subpoena**

Bebo has asserted in these proceedings that the information she seeks from Milbank is subject to a broad waiver of privilege purportedly because ALC has waived its attorney-client privilege with respect to certain communications sought by Bebo pursuant to her non-party subpoenas—specifically, communications dating from January 1, 2012 to March 14, 2013 between Milbank and ALC executives (including members of ALC’s Board of Directors) regarding the Company’s internal investigation. *See* Ex. F, Resp’t Laurie Bebo’s Submission in Resp. to the Division’s Position Regarding Her Request for Subpoenas, at 3 (Jan. 22, 2015). This position is flawed for several reasons.

First, the attorney-client privilege may only be waived by the client holding the privilege. *BCE*, 2000 WL 1239117, at \*2. The Milbank Subpoena demands that Milbank produce to Bebo its confidential communications with members of ALC’s Board of Directors and its Audit Committee, whom Milbank represented in connection with the Company’s internal investigation and the SEC investigation. And we are informed that the members of ALC’s Board of Directors and its Audit Committee have not waived their right to assert the attorney-client privilege. Accordingly, the confidential communications between Milbank and members of ALC’s Board of Directors and its Audit Committee sought by Bebo remain privileged and should not be produced.<sup>7</sup>

Second, as to ALC’s waiver, Milbank understands that Ropes & Gray has previously communicated to the SEC staff ALC’s agreement to waive, as to the SEC, the attorney-client privilege with respect to certain limited communications. *See* Ex. H, Letter from Asheesh Goel,

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<sup>7</sup> Indeed, the Division has acknowledged that it did not subpoena Milbank because it did not receive privilege waivers from the Individual Directors. *See* Ex. G, Division of Enforcement’s Resp. to the Court’s Order Regarding Subpoenas to Produce, ¶ 4 (Jan. 21, 2015).

Ropes & Gray LLP, to Scott B. Tandy, Senior Attorney, SEC (Feb. 4, 2014). Milbank understands, however, that any document production by ALC to SEC staff would have been made subject to a broader non-waiver agreement. *See* Ex. I, Letter from Asheesh Goel, Ropes & Gray LLP, to C.J. Kerstetter, SEC (Feb. 25, 2014). As such, ALC’s attorney-client privilege applicable to any Milbank communications with ALC remains intact as to Bebo. The law permits this type of arrangement between a company and the SEC. *See, e.g., Police & Fire Ret. Sys. of City of Detroit v. SafeNet, Inc.*, 2010 WL 935317, at \*1-2 (S.D.N.Y. Mar. 12, 2010) (holding that defendant did not waive attorney-client privilege or work product protection by producing privileged documents to SEC staff and federal prosecutors subject to a non-waiver agreement).

Third, although Bebo has asserted—erroneously—that any attorney-client privilege that might apply to communications between Milbank and members of ALC’s Board of Directors and its Audit Committee relating to the internal investigation has been waived by ALC, *see* Ex. F at 3, Bebo has *not* asserted that any applicable work product protection has been waived. Nor could she. Milbank has never waived any privileges or protections applicable to its work product—which represents a significant number of materials sought by Bebo. “In contrast to the attorney-client privilege, the work product privilege belongs to both the client and the attorney, either one of whom may assert it. Thus, a waiver by the client of the work product privilege will not deprive the attorney of his own work product privilege, and vice versa.” *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994); *see also Hanson v. U.S. Agency for Int’l Dev.*, 372 F.3d 286, 294 (4th Cir. 2004); *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994). As such, any attorney-client privilege ALC has agreed to waive has no effect on Milbank’s ability to invoke the work product doctrine in response to the Milbank Subpoena.

## II. THE MILBANK SUBPOENA IS UNREASONABLE, OPPRESSIVE, AND UNDULY BURDENSOME

Parties “must take reasonable steps to avoid imposing undue burden or expense when they present subpoenas to non-parties.” *Morgan Asset Mgmt., Inc.*, Administrative Proceedings Rulings Release No. 655, 2010 SEC LEXIS 2200, at \*2-3 (July 6, 2010). The Milbank Subpoena should be quashed to the extent it seeks from Milbank documents Bebo can obtain from the Division or ALC and, furthermore, to the extent it makes requests that are excessive in scope and/or unreasonable.

First, Bebo can easily obtain from the Division certain documents she seeks from Milbank. As an example, Request Eleven seeks from Milbank any materials related to Milbank presentations to the SEC, and Requests Fourteen and Fifteen seek “all documents” related to any presentation made by Milbank personnel to members of the Division. *See* Ex. A at 6-7. These broad requests appear to call for all documents produced by ALC to the Division during the SEC investigation.<sup>8</sup> Demanding that Milbank re-produce these materials to Bebo when Bebo can obtain them from the Division is unreasonable. *See Dennis J. Malouf*, Administrative Proceedings Rulings Release No. 1827, 2014 SEC LEXIS 3493, at \*12 (Sept. 22, 2014) (Elliot, A.L.J.) (“I will not require [the objecting non-party] to produce documents it knows to have been produced to . . . the Commission”); *Dennis J. Malouf*, Administrative Proceedings Rulings Release No. 1817, 2014 SEC LEXIS 3472, at \*7 (Sept. 19, 2014) (Elliot, A.L.J.) (objecting non-party “need not produce any material already provided to the Division”). Similarly, demanding that Milbank review productions ALC has previously made to the SEC to identify Bebo documents that are responsive to Bebo’s requests from Milbank is unreasonable. Again, Bebo

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<sup>8</sup> Indeed, the Division has acknowledged that, based on a cursory review, it has documents responsive to Requests Eleven, Fourteen, and Fifteen of the Milbank Subpoena that it obtained from Milbank. *See* Ex. G. As noted above, these documents, if produced to the SEC prior to late August 2013, would already have been provided to Bebo in connection with discovery in the arbitration and OSHA proceedings she initiated against ALC.

already has most (if not all) of these materials, as ALC's productions to the SEC would have been provided to Bebo in 2013 as part of discovery in her arbitration and OSHA proceedings against ALC.

Second, Bebo can obtain from ALC documents relevant to certain of her requests to Milbank. For example, as noted above, Requests One through Six seek from Milbank documents regarding the collection, preservation, transfer and disposition of Bebo's Notepads, Bebo's Board Books, and other Bebo documents. *See* Ex. A at 4-5. The contents of Bebo's office following her termination were maintained by ALC, not Milbank, and Bebo can obtain from ALC non-privileged documents regarding Bebo's materials. Indeed, Bebo has already requested from ALC production of the same materials Bebo seeks in Requests One to Six of the Milbank Subpoena. *See* Requests One to Six in Ex. E. Similarly, the written communications between Milbank and the SEC that Bebo seeks in Requests Eleven through Fifteen would be available to Bebo from ALC in the materials ALC would have produced to Bebo in 2013 as part of discovery in her arbitration and OSHA proceedings against ALC, as noted above. It is unreasonable, oppressive and unduly burdensome for Bebo to demand that Milbank search for and then produce documents Bebo can obtain from ALC. *Malouf*, 2014 SEC LEXIS 3472, at \*6 (stating that even where a subpoenaed non-party might have relevant documents, if "other subpoena recipients ... are clearly more likely to possess them, ... it is unreasonable to require production of them" by the subpoenaed non-party and modifying subpoena accordingly).

Third, the fact, as indicated in the foregoing, that Bebo already has documents she seeks from Milbank by virtue of document productions ALC made to Bebo in 2013 as part of discovery in her arbitration and OSHA proceedings against ALC weighs in favor of quashing the Milbank Subpoena. *Malouf*, 2014 SEC LEXIS 3493, at \*12 ("I will not require [the objecting

non-party] to produce documents it knows to have been produced to . . . [respondent] during the state court litigation”).

Fourth, the Milbank Subpoena is in a number of respects excessive in scope and/or otherwise unreasonable. Request Fourteen, for example, is objectionable because it seeks “[a]ll documents related to any presentations made by Milbank personnel to members of the Division,” without any limitations on subject matter or temporal scope. *See, e.g., Malouf*, 2014 SEC LEXIS 3493, at \*6 (quashing requests “without a limit on subject matter” as “overbroad and unreasonable”). Requests Seven and Ten—which seek “[a]ll documents” supporting the statement in ALC’s Form 10-Q for the quarter ending September 30, 2012 that the Board of Directors’ internal investigation had been completed and that the Board had decided not to take any action—are unreasonable because they are virtually identical. *See J. Kenneth Alderman, CPA*, Administrative Proceedings Rulings Release No. 754, 2013 SEC LEXIS 634, at \*8, 10 (Feb. 28, 2013) (Elliot, A.L.J.) (quashing duplicative requests as “unreasonable”).

Fifth, to the extent Milbank is required to create a privilege log, it should be permitted to log the documents by category rather than producing a document-by-document log. “Categorical privilege logging entails describing by category the documents withheld on privilege grounds.” *Teledyne Instruments, Inc. v. Cairns*, 2013 WL 5781274, at \*16 (M.D. Fla. Oct. 25, 2013) (citation and internal quotation marks omitted). A categorical privilege log identifies the document by type, date range, types of authors and recipients, and the privilege asserted. *See Mfrs. Collection Co. v. Precision Airmotive, LLC*, 2014 WL 2558888, at \*3-6 (N.D. Tex. June 6, 2014). A categorical privilege log is appropriate where “(a) a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the

privilege claim is well grounded.” *SEC v. Thrasher*, 1996 WL 125661, at \*1 (S.D.N.Y. Mar. 20, 1996); *see also Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) (“[T]here is a strong justification for a categorical log when thousands of documents have been withheld.”).

Here, listing every single privileged and/or protected document and describing the basis for asserting attorney-client privilege or work product protection would be unduly burdensome because it would require Milbank attorneys to spend hundreds of hours logging thousands of documents at significant cost. Moreover, a document-by-document log provides no clear benefit to Bebo in assessing whether Milbank’s attorney-client privilege and work product claims are accurate, as Bebo’s counsel can readily determine through a categorical privilege log whether attorney-client privilege or the work product doctrine applies. Accordingly, to the extent Milbank is required to generate a privilege log, it should be permitted to create a categorical log rather than a document-by-document log.<sup>9</sup>

Sixth, to the extent Bebo demands that Milbank create a document-by-document privilege log with respect to the thousands of privileged or protected documents called for by the Milbank Subpoena (or to the extent production of documents ultimately is required), Bebo should be required to compensate Milbank for the costs, including the costs of attorney time. *See Dennis J. Malouf*, Administrative Proceedings Rulings Release No. 1951A, 2014 SEC LEXIS 4168, at \*2 (Oct. 28, 2014) (ordering respondent to pay objecting non-party’s costs, including

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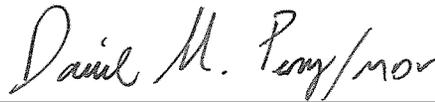
<sup>9</sup> *See Mfrs. Collection Co.*, 2014 WL 2558888, at \*3-6 (noting trend of courts endorsing categorical log approach, and permitting defendant to create categorical log where request for production “on its face” sought wholesale production of documents ordinarily covered by attorney-client privilege and work product doctrine); *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 479 (S.D. Cal. 1997) (holding that document-by-document log would be unreasonable and unduly burdensome where its creation would be expensive and onerous and where it was clear that majority of documents created during three-year span of litigation would be protected by attorney-client privilege and work product doctrine); *Thrasher*, 1996 WL 125661, at \*1-2 (holding that SEC was not entitled to a document-by-document log, and allowing subpoenaed defendant to create categorical log where document-by-document listing “would be a long and fairly expensive project for counsel” and where SEC failed to establish why it needed detailed log to determine applicability of privileges).

“costs of attorney time” at the applicable hourly rate, where scope of review and production was large); *see also* 17 C.F.R. § 201.232(e)(2).

**CONCLUSION**

For the reasons set forth above, the Milbank Subpoena should be quashed. To the extent Bebo demands that Milbank create a privilege log with respect to the privileged or protected documents called for by the Milbank Subpoena, Milbank should be permitted to prepare a categorical log rather than a document-by-document log. To the extent Bebo demands that Milbank create a document-by-document privilege log with respect to the thousands of privileged or protected documents called for by the Milbank Subpoena (or to the extent production of documents ultimately is required), Bebo should be required to compensate Milbank for the costs, including the costs of attorney time, under Rule 232(e)(2).

Dated: February 20, 2015  
New York, New York



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Jonathan Ohring  
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[REDACTED]

Dated: February 20, 2015

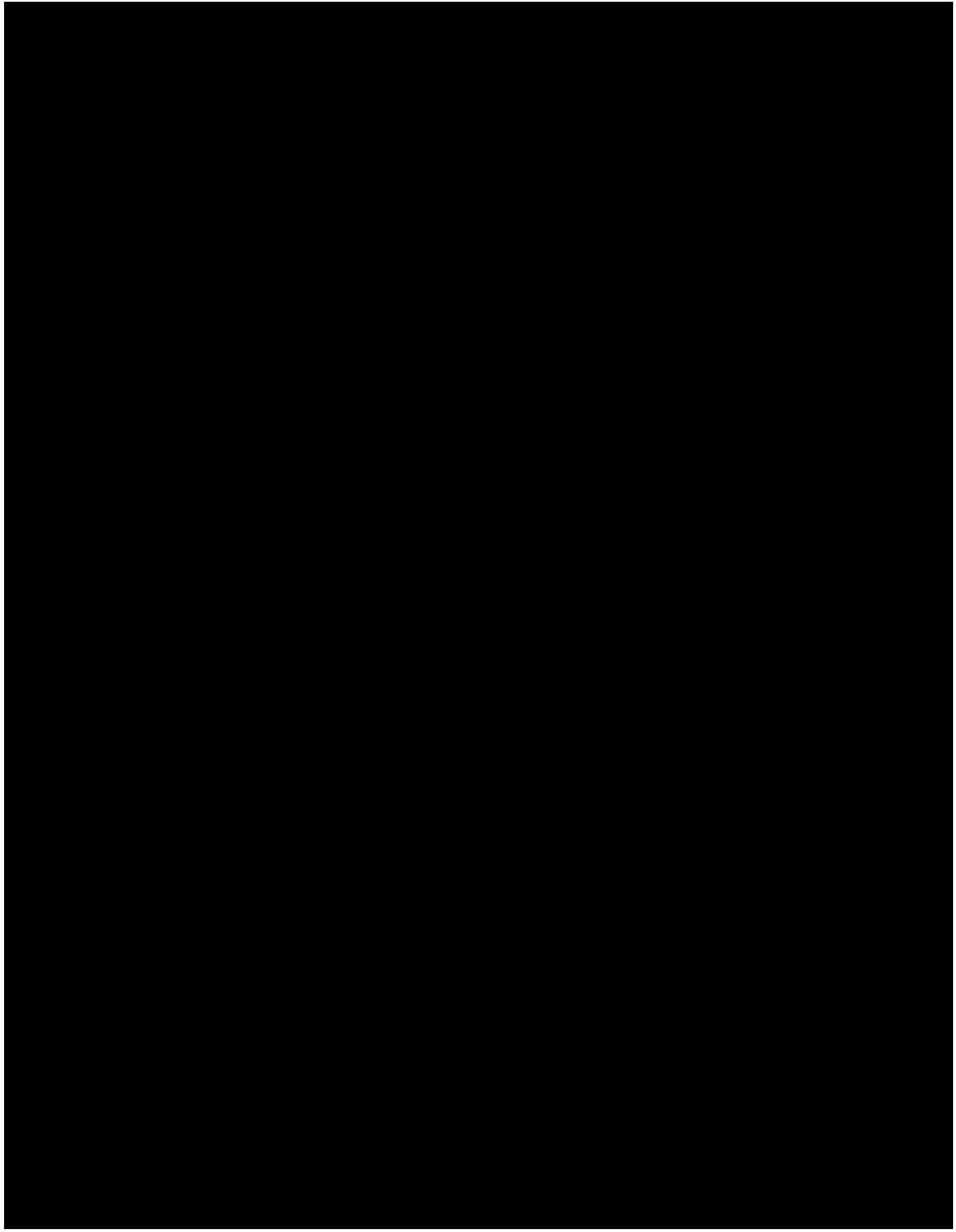
Respectfully submitted,



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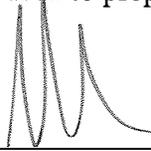
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CERTIFICATE OF COMPLIANCE WITH SEC'S RULE OF PRACTICE 154(c)

I hereby certify that this brief complies with the length limitation set forth in SEC Rule 154(c). According to the word processing system used to prepare this document, the brief contains 6,077 words.

A handwritten signature in black ink, appearing to read 'M. Villaverde', positioned above a horizontal line.

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Mark D. Villaverde

# **Exhibit A**

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-16293**

**In the Matter of**

**LAURIE BEBO, and**  
**JOHN BUONO, CPA,**

**Respondents.**

**SUBPOENA *DUCES TECUM* TO**  
**PRODUCE DOCUMENTS**

TO: Milbank, Tweed, Hadley & McCloy LLP  
1 Chase Manhattan Plaza  
New York, NY 10005

TAKE NOTICE: By authority of Section 556 of the Administrative Procedures Act, as amended (5 U.S.C. § 556), and Rules 111 and 232 of the Rules of Practice of the United States Securities and Exchange Commission (17 C.F.R. §§ 201.111, 201.232), and upon an application for subpoena made by Respondent Laurie Bebo;

YOU ARE HEREBY ORDERED to produce the documents, electronically stored information, or objects described below, and permit their inspection, copying, testing or sampling. Documents must be produced to Reinhart Boerner Van Deuren s.c., 1000 North Water Street, Suite 1700, Milwaukee, Wisconsin, 53202, on or before February 9, 2015. The U.S. Securities and Exchange Commission's Rules of Practice require that any application to quash or modify a subpoena comply with Commission Rule of Practice 232(e)(1) (17 C.F.R. § 201.232(e)(1)).

## DEFINITIONS AND INSTRUCTIONS

1. You are instructed to produce documents and/or electronically stored information evidencing, commemorating, reflecting and/or relating to the following list.
2. Unless otherwise specified, the relevant time frame is November 10, 2006 to the present.
3. The term and "Milbank" refers to Milbank, Tweed, Hadley & McCloy LLP and includes (a) all of its affiliates, divisions, units, successor and predecessor entities, subsidiaries, parents, and assigns; (b) all of its present and former officers, directors, agents, employees, representatives, accountants, investigators, and attorneys; (c) any other person acting or purporting to act on its behalf; or (d) any other person otherwise subject to its control, which controls it, or is under common control with it.
4. The terms "Assisted Living Concepts, Inc." or "ALC" refer to Assisted Living Concepts, Inc. and includes (a) all of its affiliates, divisions, units, successor and predecessor entities, subsidiaries, parents, and assigns, including but not limited to Assisted Living Concepts, LLC (d/b/a Enlivant); (b) all of its present and former officers, directors, agents, employees, representatives, accountants, investigators, and attorneys; (c) any other person acting or purporting to act on its behalf; or (d) any other person otherwise subject to its control, which controls it, or is under common control with it.
5. The term "Internal Investigation" refers to the internal investigation of possible purported irregularities in connection with ALC's lease with Ventas, conducted by Milbank and ALC's audit committee and/or board of directors as disclosed in ALC's May 4, 2012 Form 8-K filed with the U.S. Securities and Exchange Commission (the "SEC") and which was concluded

prior to ALC's disclosure in its Form 10-Q filed with the SEC on November 8, 2012 that "the Board determined not to take any action" as a result of the completed investigation.

6. "Communication" means any oral, written, electronic, or other transfer of information, ideas, opinions or thoughts by any means, from or to any person or thing.

7. "Including" means "including without limitation."

8. "Relate to," "related to" and "relating to," mean mentioning or describing, containing, involving or in any way concerning, pertaining or referring to or resulting from, in whole or in part, directly or indirectly, the stated subject matter.

9. The terms "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these requests any document or thing which might otherwise be construed to be outside their scope.

10. "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, writings, drawings, graphs, charts, photographs, sound records, images, electronic or computerized data compilations and other electronically stored information, and any versions, drafts or revisions of any of the above. Any document which contains any comment, notation, addition, insertion or marking of any kind which is not part of another document which does not contain a comment, notation, addition, insertion or marking of any kind which is part of another document, is to be considered a separate document.

11. "Electronically stored information" means all information that is created, manipulated, or stored in electronic form regardless of the medium. Electronically stored information also includes any deleted data that once existed as live data but has been erased or

deleted from the electronic medium on which it resided. Even after deleted data itself has been overwritten or wiped, information relating to the deleted data may still remain.

12. A document or thing is deemed to be in your control if you have the right to secure the document or thing or a copy thereof from another person or entity having actual possession of the document or thing. If any document or thing responsive to this request was, at one time, but is no longer, within your possession or control, state what disposition was made of the document or thing, by whom, the approximate date of the disposition, and the reason for the disposition.

13. If any request for documents is deemed to call for the production of privileged or work product materials and such privilege or work product is asserted, provide the following information with respect to each withheld document:

- (a) the privilege(s) and/or work product protection asserted;
- (b) the date on which the document was created or finalized;
- (c) the number of pages, including any attachments or appendices;
- (d) the names of the document's author, authors or preparers;
- (e) the name of each person to whom the document was sent, carbon copied or blind carbon copied;
- (f) the subject matter of the document or responses, and in the case of any document relating or referring to a meeting or conversation, identification of such meeting or conversation.

#### DOCUMENTS TO BE PRODUCED

1. All documents referring or relating to how the documents, files, notes, and other ALC property located in Ms. Bebo's office at ALC's headquarters in Menomonee Falls, Wisconsin were collected, preserved, and/or destroyed after she ceased being employed by ALC on May 29, 2012, including but not limited to certain legal-style note pads that Ms. Bebo

prepared and compiled during the course of her employment and maintained in her office (hereafter referred to as "Ms. Bebo's Notepads") and her copies of materials provided to ALC's board of directors (or any committee thereof) in advance of or in connection with meetings of the board or any committee that were maintained in her office in three-ring binders along with her notes from those meetings (hereafter referred to as "Ms. Bebo's Board Books").

2. Documents sufficient to identify the chain of custody of Ms. Bebo's Notepads and Ms. Bebo's Board Books after she ceased being employed by ALC on May 29, 2012, including but not limited to any records reflecting the transmission of Ms. Bebo's Notepads and Ms. Bebo's Board Books to Milbank and from Milbank to the law firm of Ropes & Gray LLP.

3. All documents referring or relating to the current location of any of Ms. Bebo's handwritten notes she prepared in the course of her employment at ALC, including but not limited to Ms. Bebo's Notepads and Ms. Bebo's Board Books.

4. All documents and correspondence related to the collection, retention, destruction or transfer of Ms. Bebo's ALC documents after she ceased being employed by ALC on May 29, 2012 up until the present.

5. All documents referring or relating to any discussions or plans to destroy any of the documents, files, notes, and other ALC property located in Ms. Bebo's office at ALC's headquarters prior to the time Ms. Bebo ceased being employed by ALC, including but not limited to Ms. Bebo's Notepads and Ms. Bebo's Board Books.

6. All documents and correspondence relating to any action that led to the destruction of any of Ms. Bebo's handwritten notes she prepared in the course of her employment at ALC, whether inadvertent or intentional.

7. All documents that support the following statement made in ALC's Form 10-Q, filed with the Commission on or about November 8, 2012 for the quarter ending September 30, 2012: "The previously disclosed internal investigation being conducted by the Board of Directors has been completed. The Board has determined not to take any action."

8. All documents reflecting statements by witnesses during interviews or discussions in connection with the Internal Investigation, including any notes, memoranda, or summaries of the same.

9. All documents forming the basis for the statements made by Milbank personnel to personnel at Grant Thornton as set forth in the Grant Thornton memorandum attached hereto as Exhibit A, including documents reflecting statements by the following witnesses made to Milbank or anyone acting on Milbank's behalf in the course of the Internal Investigation:

- Laurie Bebo
- John Buono
- Mary Zak-Kowalczyk
- Wally Levonowich
- Jared Houck
- John Lucey
- Cathy Swarthout
- Anthony Ferreri
- Sara Hamm
- Eric Fonstad
- Robin Herbner
- Alan Bell
- Mel Rhineland
- Derek Buntain
- Malen Ng
- David Hennigar
- Anyone associated with Ventas, Inc.

10. All documents that refer, reflect, or support the following statement made in ALC's Form 10-Q, filed with the Commission on November 8, 2012 for the quarter ending

September 30, 2012: "The previously disclosed internal investigation being conducted by the Board of Directors has been completed. The Board has determined not to take any action."

11. Any reports, memoranda, or presentation materials related to any conclusions of the internal investigation, including but not limited to any materials related to presentations to the ALC board, a committee of the ALC board, the SEC, or any other third party.

12. All documents related to a December 17, 2012 telephone conference among personnel from Milbank, personnel from Grant Thornton LLP, Malen Ng, and Alan Bell, including but not limited to any notes reflecting the telephone conference and any materials prepared or utilized to convey information during the telephone conference or referred to during the telephone conference. The December 17, 2012 phone call is further described in Exhibit A.

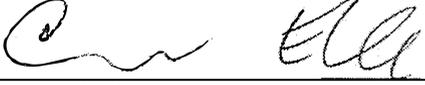
13. All documents related to a February 15, 2013 telephone conference among personnel from Milbank, personnel from Grant Thornton LLP, Malen Ng, and Alan Bell, including but not limited to any notes reflecting the telephone conference and any materials prepared or utilized to convey information during the telephone conference or referred to during the telephone conference. The February 15, 2013 phone call is further described in Exhibit A.

14. All documents related to any presentations made by Milbank personnel to members of the Division of Enforcement of the SEC including but not limited to any notes reflecting what was said during the meeting and any materials prepared or utilized to convey information during the presentation or referred to during the presentation.

15. All documents related to a presentation made by Milbank personnel to members of the Division of Enforcement of the SEC, including C.J. Kerstetter, in September 2012, including but not limited to any notes reflecting what was said during the meeting and any

materials prepared or utilized to convey information during the presentation or referred to during the presentation.

Dated this 23 day of January, 2015.

By:   
\_\_\_\_\_  
Honorable Cameron Elliot  
Administrative Law Judge

26118277

**Consultation Report**

<b>Legal Name</b>	<b>Assisted Living Concepts, Inc.</b>	<b>Status</b>	<b>Approved</b>
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**Overview**

<b>Client Information</b>	
Legal Name	Assisted Living Concepts, Inc.
Audit Date	12/31/2012
Responsible Office	Milwaukee
Public	Yes
<b>Consultation Information</b>	
Category	Other
Topic	Other
Issue	Adequacy of the scope of the whistleblower investigation.
<b>Consultation Team</b>	
Preparer	Roller, Matthew W
Approver	Fox, Robert Gaston
Engagement Partner	Robinson, Jeffery J
Quality Control Reviewer	Trouba, James S
Professional Standards Partner	Lester, Denni
National Professional Practice Director	Fox, Robert Gaston
Subject Matter Specialist	

**Authorization**

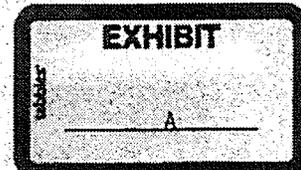
This record is ready for approval.	Yes
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**Approvals**

 Preparer	Roller, Matthew W	2/27/2013 4:58:13 PM
 Approver	Fox, Robert Gaston	2/27/2013 8:12:47 PM
 Engagement Partner	Robinson, Jeffery J	2/27/2013 5:38:59 PM
 Quality Control Reviewer	Trouba, James S	3/1/2013 10:42:44 AM

CONFIDENTIAL TREATMENT IS  
REQUESTED FOR THIS INFORMATION  
BY GRANT THORNTON LLP  
175 WEST JACKSON BOULEVARD  
20TH FLOOR  
CHICAGO, ILLINOIS 60604

GT-SEC00805428



**Assisted Living Concepts, Inc.**

Topic: Other

Issue: Adequacy of the scope of the whistleblower investigation.

**Discussion**

Date: February 26, 2013

To: The Files

From: Matt Roller

Re: Whistleblower Memo

**Purpose**

The purpose of this memo is to discuss the content of the whistleblower letter received by the audit committee of Assisted Living Concepts, Inc. ("ALC" or the "Company") and the subsequent investigation performed by the Company's counsel, Milbank, to assess the adequacy of the investigation performed to conclude upon if the engagement team is comfortable with the adequacy of the procedures performed during the investigation by Milbank. Information within this memo was obtained from the following sources:

- The whistleblower letter sent to the audit committee of the Company
- Discussions with Milbank representatives on December 17, 2012; participants on the call included the following:
  - Milbank
    - Mike Hirschfield, Partner
    - Tom Arena, Partner
  - Grant Thornton LLP
    - Jeff Robinson, Lead Audit Partner
    - Matt Roller, Audit Manager
    - Chris Sberzer, Managing Director, Office of the Chief Legal Officer
    - Gene Cahill, Forensic and Valuation Services Senior Manager
  - ALC
    - Malen Ng, Audit Committee member
    - Alan Bell, Audit Committee member
- Discussions with Milbank representatives on February 15, 2013; participants on the call included the following:
  - Milbank
    - Mike Hirschfield, Partner
    - Tom Arena, Partner
  - Grant Thornton LLP
    - Jeff Robinson, Lead Audit Partner

- Matt Roller, Audit Manager
- Chris Shaver, Managing Director, Office of the Chief Legal Officer
- Gene Cahill, Forensic and Valuation Services Senior Manager
- Mark Sullivan, Forensic and Valuation Services Partner
- Brett Fox, Partner – Professional Standards Group
  - o AIC
  - Malen Ng, Audit Committee member
  - Alan Bell, Audit Committee member
- Capstone Advisory Group Report – to discuss findings and conclusions related to the SEC inquiry

#### Content of the Whistleblower Letter

The whistleblower letter dated May 2, 2012, was sent to the Chair of the Audit Committee (see Exhibit A for a copy of the redacted letter we obtained from Millman). Following is a summary of the allegations present in the whistleblower letter:

- One of the spreadsheets in said excel workbook (related to the lease covenant – specifically related to occupancy) contained a list of supposed “employees” who lease rooms at the various CareVia buildings. The list of “employees” was used to inflate occupancy and calculate the journal entries used to reallocate revenue from other ALC facilities to the CareVia facilities, thus inflating the CareVia revenue.
- The whistleblower immediately recognized the list of “employees” as a sham. The list contained:
  - 1) Employees who occupied rooms in multiple buildings on the same day and 2) Corporate office employees who rarely travel for business. These people have no physical connection to the buildings and the whistleblower seen them in the office on a daily basis and 3) People who are not ALC employees. These people included Laurie Babo’s (former CEO) husband (he has a different last name), Laurie’s parents (under her mother’s maiden name) and at least one family friend (Korina Schwery).
- The whistleblower’s role was to report the number of actual residents that each building lost or gained each month to John Binono (CEO). The whistleblower alleges other employees used a formula to “backfill” to the number of employees John and Laurie used to add to each building to meet the covenant requirements. John would then take the list of “employees” to Laurie and she would delete the employees who resigned during the month and add names to the list to make up for the resident’s lost and actual employees that left the Company. The whistleblower then updated the spreadsheet with the new names and calculated the covenant.
- The excel workbook is then passed to Grant Thornton. Whistleblower contends they are not aware if Grant Thornton ever compared the list of “employees” to the Company’s payroll records. Whistleblower alleges Grant Thornton never seemed to realize that Laurie’s husband and parents were on the list or at least they (Grant Thornton) never objected. After the Grant Thornton review of the excel workbook, the Company sent the excel workbook to Ventus. However, in the revision of the excel workbook sent to Ventus, John made it clear that Ventus was not to see the list of employees included in the occupancy (and that his was deleted out of the excel workbook before it was sent to Ventus).

- The whistleblower alleges that among other things, the whistleblower objected to the list of "employees", the lack of leases with these employees, the lack of cash transferred for these leased rooms and the fact the facility financial statements were not prepared in conformity with GAAP as required under the lease. John assumed the whistleblower that 1) Venus knew about the employee leases; 2) the Board of Directors knew and approved the process and 3) measures would be taken to increase the actual occupancy of these facilities.
- In November 2011, the whistleblower met with Lurie and John for an hour. During the meeting, the whistleblower went through their list of reasons why they thought the Company was violating the lease terms. Lurie assumed the whistleblower that 1) two payments from Grant Thornton had approved the Company's process; 2) Venus approved the Company's "leasing" to Company employees and 3) the Board of Directors had approved the Company's process. After a clear statement, Lurie indicated the whistleblower was no longer required to be a part of the process going forward. As a result, the whistleblower has not been a part of the calculations since November 2011.

#### Milbank's Investigation

As discussed above, the audit team (along with several specialists) had a teleconference with Milbank representatives on December 17, 2012 to discuss the scope of Milbank's investigation in an attempt to conclude on the adequacy of their investigation and the engagement team's ability to rely on the results of the investigation undertaken. Milbank's investigation involved inquiries of Company officers and employees, inquiries of Board of Director members, and collection and review of documents from Company directors and employees.

- Inquiries of Company officers and employees (including former applicable employees)
  - Lurie Bobb, former CEO
  - John Budson, CFO (interviewed twice)
  - Mary Zak-Kosniarski, VP Secretary and General Counsel
  - Wally Lerouxovich, VP Controller
  - Jared Hovock, Division VP
  - John Lacey, Director of Financial Reporting
  - Cathy Swartzburg, Financial Analyst
  - Anthony Kerasi, Assistant Controller
  - Sara Harza, VP Quality and Case Management
  - Eric Roushad, former VP Secretary and General Counsel
  - Robin Harber (formerly Robin Harz), former Accounting Manager
- Inquiries of Board of Directors
  - Alan Bell
  - Mel Rindlander
  - Dalek Burnin
  - Madan Ng
  - David Haudiger
- Collection of documents
  - The Company engaged FTI Consulting to collect documents, including collecting and imaging desktop and laptop computers, the "P" drive, other shared drives, email servers, backup tapes of email and file shares for the period back to 2009

- The imaging and collection of documents included, but were not limited to, the desktops, laptops and emails of the following Company officers, employees and former employees:
  - Laurie Bebo, former CEO
  - John Bruno, CFO (Interviewed twice)
  - Mary Zale-Kowalczyk, VP Secretary and General Counsel
  - Wally Leronowich, VP Controller
  - John Lacey, Director of Financial Reporting
  - Dan Grochowski, Director of Tax and Treasury
  - Anthony Ferreri, Assistant Controller
  - Darr Hoberman, Director of Internal Audit
  - William Bell, Director Facilities Management
  - Amber Beale, Senior Corporate Counsel
  - Lisabeth Richards, Paralegal
  - Joby Rosenthal, Legal Specialist
  - Nancy Kahl, Systems Improvement Specialist (GL accounting)
  - Mike Christian, Financial Analyst
  - Danny Vasquez, Regional Accountant
  - Durbin VanZee, Regional Accountant
  - Jamie Warren, AR Analyst
  - Keith Reardon, RSDM PA
  - Auna Hardt, Executive Assistant
  - Becky Schneider, Executive Assistant
  - Robin Birt, former employee (Accounting Manager)
  - Sean Schalfout, former employee (Treasury Manager)
  - Eric Forstad, former employee (VP Secretary and General Counsel)
- The principal document review involved emails and documents that were sent to or from Laurie Bebo and John Bruno at these are the two individuals who were at the center of what the whistleblower thought was inappropriate. They also obtained the lease certificates and BOD packages.

Based on these procedures performed, Milbank reviewed at the following conclusions:

- The Company had used units that were rented for employees use when calculating occupancy for the Venitas lease. ALC would not have been in compliance with the covenant without including the employees (late 2009 - 2011).
- Milbank was not able to determine if the employees rented units had been undertaken without knowledge and approval of Venitas.
- It was senior management's thoughts that the rental of units for employee use was specifically addressed by Venitas and approved by Venitas. Milbank communicated with Venitas regarding this issue and Venitas representatives were unable to communicate to Milbank that they had not agreed to the arrangement (employee rented units). Current management of Venitas could not confirm nor deny whether the arrangement was authorized or unauthorized.
- Per inquiries with Laurie Bebo, she had a conversation with Joe Solari (Venitas representative) who had approved the arrangement. Joe was terminated from Venitas during deposing efforts in 2009. Joe left Venitas in April 2009, a couple months after he received an email from Laurie Bebo regarding the arrangement (on 2/4/2009).
- Laurie Bebo's 2/4/2009 email to Joe Solari included the following content:

- o 75% - communication/request for approval of potential subleasing of units to a Hospice Care business
- o 25% - communication/request for approval of the employee leasing arrangement
- o Milbank noted the email from Laurie to Joe was forwarded to Joe's supervisor where Joe asked for approval of the subleasing arrangement however, there was no communication regarding the employee leasing arrangement.
- o Joe sent a follow up email to Laurie to discuss the Hospice Care subleasing arrangement
- o ALC management indicate that if the employee subleasing arrangement was unacceptable, Ventas would have responded regarding the proposed arrangement
- Milbank did conclude that absent discussion or agreement with Ventas, the employee leasing arrangement would not have been consistent with the terms of the lease agreement.
- Milbank was not able to conclude that the Company was not in compliance with the lease.
- Milbank's investigation did not lead to any internal punishments. Laurie Bebo was terminated before the investigation was completed and her termination was unrelated to the investigation.
- In regards to certain statements included within the whistleblower letter, Milbank responded with the following (based on their document review and inquiries performed):
  - o List of employees was a sham
    - Milbank concluded Laurie Bebo's parents were on the list
    - Laurie and her parents would go on 'impromptu shopping' trips where they would go to competitor assisted living facilities and Laurie would pose as a daughter trying to help her parents find a living community to compare prices, etc. with the Company's facilities
    - In 2009, the Company provided lots of support to the CasaVita properties and it was not unusual that employees would have been staying at the properties
  - o Meaning the covenant was "backed into"
    - Employees were used to meet compliance
    - Laurie Bebo arranged a situation with Joe Solari so they could work together to get through tough times. This occupancy covenants were included in the lease terms due to the company that formerly leased the Ventas properties (it was not as large of a company as ALC so the occupancy covenants were included to ensure that company could pay their monthly rent). However, ALC was a much larger company and were less of a risk to pay their monthly rent as they operated a much larger portfolio of properties.
    - It is management's contention that Joe Solari understood this situation and as a result did not have an issue with the employee leasing arrangement

#### Forensic Accountants Review of Other Compliance Certificates

As a part of the SEC investigation, the SEC requested that the Company hire a forensic accountant to test a sample of other compliance certificates provided to third parties in the past. The Company's counsel, Milbank, hired Capstone Advisory Group ("Capstone") to assist with this project. Capstone conducted an inquiry focused on the accuracy of financial compliance certificates provided by ALC pursuant to three loan agreements; (1) The 2006 Credit Agreement between the Company and General Electric Capital Corporation; (2) The 2010 Amended and Restated Loan Agreement between ALC Three (a wholly owned subsidiary of the Company), the Company and TCF National Bank; and (3) The 2011 Credit Agreement between the Company and US Bank National Association. Capstone tested the compliance certificates for specific reporting periods, selected based on communications between Milbank and the SEC. Overall, Capstone found the compliance certificates to be accurate. See a copy of their full findings and conclusions at <Capstone Report - SEC Investigation>

## Conclusion

### GT's Conclusions

Based on our discussions with Milbank, we have concluded that the scope of the investigation Milbank performed is adequate. Specifically, from our discussion, it appears Milbank has performed inquiries of the appropriate individuals and limited their document search to the appropriate constraints to arrive at a well-informed conclusion. As a result, GT will not complete a separate investigation and will rely on the results of the investigation completed by Milbank.

## References

# **Exhibit B**

# MILBANK, TWEED, HADLEY & McCLOY LLP

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March 4, 2014

## VIA EMAIL

Scott Tandy, Esq.  
Senior Attorney  
U.S. Securities & Exchange Commission  
Chicago Regional Office  
175 W. Jackson Blvd., Suite 900  
Chicago, IL 60614

Re: Assisted Living Concepts, Inc. (C-7948)

Dear Scott:

I write on behalf of Milbank, Tweed, Hadley & McCloy LLP (the "Firm"), in response to your email of February 28, 2014 requesting information regarding legal representation of Assisted Living Concepts, Inc. ("ALC" or the "Company").

Below is the information you requested regarding the Firm's representation of the Company, members of its Board of Directors, and others. This information is based solely on the Firm's records and discussion with the Firm's attorneys. The Firm has not conferred with its former clients in responding to your request for information. Accordingly, the Commission should not rely solely on any of the information below to make a determination about the extent and nature of the Firm's representation of the various persons and entities discussed below. *See, e.g., Merck Eprova AG v. ProThera, Inc.*, 670 F.Supp.2d 201, 210 (S.D.N.Y. 2009) (citations omitted) ("The formation of an

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attorney-client relationship hinges upon the client's reasonable belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice. No special formality is required to demonstrate the establishment of the relationship."); *see also* 23 Williston on Contracts §62:3 (4th ed.) (attorney-client relationship may be implied by conduct of the parties). The Firm's specific response to your questions is set forth below:

**(1) ALC's Audit Committee as a whole.**

The Firm represented ALC's Audit Committee with respect to the Company's investigation regarding certain lease disclosures by ALC (the "Internal Investigation"). That representation began in May 2012 and concluded in November 2013.

**(2) ALC's Board of Directors as a whole.**

The Firm represented the ALC Board of Directors as a whole in relation to the Company's Internal Investigation. That representation began in July 2012 (after Ms. Bebo was removed from the Board of Directors) and concluded in November 2013.

**(3) ALC, the Company.**

The Firm represented ALC in relation to the SEC's currently ongoing investigation ("SEC Investigation"). That representation began in June 2012 and concluded in November 2013.

The Firm also represented ALC in relation to a stockholder derivative action styled *George Passaro v. Laurie A. Bebo, et al.*, 12 CV 010106, filed in the Circuit Court, Milwaukee County, for the State of Wisconsin (the "Passaro Action"). That representation began shortly after the Company was named as a defendant in that action in September 2012 and concluded after the action was dismissed in June 2013.

The Firm represented ALC in relation to five stockholder actions filed in the Eighth Judicial District Court for the State of Nevada and for Clark County and consolidated under the caption *In re Assisted Living Concepts, Inc. Shareholder Litigation*, Case No. A-12-6754054-C (consolidated with Case Nos. A-13-677683-C, A-13-677797-C, A-13-677838-C, and A-13-677902-C) (the "Nevada Actions"). That representation began shortly after the Company was named as a defendant in the first of these actions in December 2012 and concluded after the actions were settled in April 2013.

In addition, the Firm represented the Company in relation to a securities class action styled *Robert E. Lifson, individually and on behalf of all others similarly situated, plaintiff, against Assisted Living Concepts, Inc. and Laurie A. Bebo, defendants*, Case No. 12-cv-884, filed in the United States District Court for the Eastern District of Wisconsin. That representation began shortly

after the Company was named as a defendant in August 2012 and concluded after the action was dismissed in December 2013.

The Firm also represented ALC in actions filed against the company by Laurie Bebo:

- On June 29, 2012, Laurie Bebo filed an action against the Company styled *Bebo v. Assisted Living Concepts, Inc.*, Case No. 2012CV002039, in the Circuit Court, Waukesha County, for the State of Wisconsin. The Firm's representation began shortly after the action was filed and concluded after the action was dismissed in June 2013.
- On June 29, 2012, Laurie Bebo filed an arbitration demand against the Company with the American Arbitration Association, Case No. 51 166 857 12 (the "Bebo Arbitration"). The Firm's representation began shortly after the arbitration demand was filed and concluded after the demand for arbitration was dismissed in October 2013.
- On July 26, 2012, Laurie Bebo filed a purported Sarbanes-Oxley whistleblower complaint under Section 806 of the Sarbanes-Oxley Act with the U.S. Department of Labor Occupational Safety and Health Administration ("OSHA"), identified by the file name "Assisted Living Concepts/Bebo/5-3100-12-045" (the "Bebo SOX Action"). The Firm's representation began in October 2013, when OSHA first informed the Company that the complaint had been filed, and concluded after the complaint was dismissed in November 2013.
- On May 15, 2013, the State of Wisconsin, Department of Work Force Development, Equal Rights Division notified the Company that in March 2013 Laurie Bebo had filed a retaliation complaint under the State of Wisconsin's Elder Abuse/Healthcare Worker laws. The Firm's representation began shortly after the Company was notified of the complaint and concluded after the complaint was dismissed in November 2013.

**(4) Any or all of the directors on ALC's Board of Directors individually.**

The Firm represented the individual members of the ALC Board of Directors (other than Bebo) in relation to the Passaro Action and the Nevada Actions. That representation was concurrent with The Firm's representation of the Company in those actions.

In addition, in connection with the Firm's representation of the Company in the Bebo Arbitration and the Bebo SOX Action, the Firm defended certain individual members of the ALC Board of Directors at depositions in those matters. The individual directors were witnesses appearing

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Page 4

on behalf of the Company at the Company's direction/request and were no longer on the Board of Directors at the time they appeared.

The Firm also represented the individual members of the ALC Board of Directors (other than Bebo) in relation to the SEC Investigation. That representation began in the Spring of 2013, at the time of the SEC's oral request for documents from the directors, and concluded in November 2013.

**(5) Any or all of ALC's employees individually.**

The Firm has not represented any ALC employees individually.

If you have any questions, please do not hesitate to contact me by phone at [REDACTED]

Sincerely,

  
Daniel M. Perry

# **Exhibit C**



[REDACTED]

August 26, 2013

Christopher P. Banaszak  
Direct Dial: [REDACTED]

DELIVERED BY COURIER  
SENT BY E-MAIL

Steven L. Gillman, Esq.  
c/o Ms. Trenda Benitez  
American Arbitration Association

[REDACTED]

Dear Attorney Gillman:

Re: *In re Laurie Bebo v. Assisted Living Concepts, Inc.*;  
AAA No.: 51 166 00857 12

Complainant Laurie Bebo ("Bebo") submits this letter to request that the Arbitrator (1) stay her deposition; (2) order Respondent Assisted Living Concepts, Inc. ("ALC") to provide certain unredacted documents; (3) order ALC to provide Bebo with a privilege log; and (4) sanction ALC for its spoliation of critical evidence.

ALC continues to engage in a pattern of discovery abuses designed to frustrate Bebo's efforts to pursue her claim and respond to ALC's allegations regarding the reasons for her termination. First, after previously stating that it had no further documents to produce, ALC produced over 23,000 pages of documents today—only three days before Bebo's scheduled deposition. Second, ALC has sought to simultaneously use documents to support its alleged basis for Bebo's termination while withholding significant portions of those documents based on its assertion that it cannot provide them to Bebo because they are privileged. This assertion is particularly improper because in many instances Bebo, as the former CEO of ALC, was the sender or recipient of the allegedly privileged communications. ALC cannot use these documents as both a sword and a shield. Third, ALC has failed to produce any privilege log, despite being so required. Fourth, ALC has lost or destroyed critical evidence. As a result of these discovery abuses, Bebo requests that her deposition be stayed and that sanctions be awarded against ALC.

**1. Bebo's Deposition Must Be Stayed Due To ALC's Production of More Than 23,000 Pages of Documents Three Days Before Bebo's Deposition and Because ALC Inappropriately Produced Redacted Documents That Directly Pertain to Issues in Dispute.**

On July 1, 2013, Bebo served ALC with her first set of discovery requests in connection with her claim filed against ALC for violations of the Sarbanes-Oxley Act ("SOX").<sup>1</sup> On July 30, 2013, ALC requested its discovery response deadline be extended to August 9th. Bebo granted ALC's request. On August 9, 2013, ALC requested its discovery deadline be extended once again. In response to this request, counsel for Bebo asked how many documents ALC would be producing, and Attorney Elise Bernanke, counsel for ALC, replied that, "We do not have any new documents at this time." Relying on this representation, Bebo agreed to extend ALC's discovery response deadline to August 13th.

ALC submitted its discovery responses on August 13, 2013, and it did not produce any documents at that time. On Tuesday, August 20, 2013, counsel for Bebo asked ALC if it would be producing any additional documents. Counsel for ALC informed Bebo that it anticipated making a supplemental production on Friday, August 23rd. On Monday, August 26, 2013—only three days before Bebo's scheduled deposition—ALC produced more than 23,000 pages of documents on a disk. Due to the large number of documents, it will take at least one day just to print all these documents, leaving Bebo with less than two days to review the documents in advance of her deposition. In order to review all of these documents before her deposition, Bebo would have to review approximately 500 pages per hour for 48 straight hours. Without adequate time to review the documents, Bebo will be unfairly prejudiced during her deposition.<sup>2</sup> Therefore, Bebo requests her deposition be stayed to permit her adequate time to review the newly produced documents.

**2. ALC Should Be Ordered To Reveal Redacted Portions Of Documents.**

ALC redacted many of the documents it produced on the basis that the content is protected by the attorney-client privilege. However, ALC is not entitled to assert the attorney-client privilege against Bebo over documents and communications generated during Bebo's tenure as CEO. *See Gottlieb v. Wiles*, 143 F.R.D. 241, 246-47 (D. Colo. 1992) (finding that providing documents to a former director would not advance the policy underlying the privilege "by now denying [the former director] access to documents which he could have seen upon

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<sup>1</sup> Although the requests were issued in the SOX matter, the parties have stipulated that the documents produced in the SOX dispute may also be used in the AAA matter.

<sup>2</sup> The prejudice stemming from ALC's belated production of documents is heightened by the fact that similar discovery requests have been outstanding since as early as November of 2012. Bebo issued discovery requests to ALC in the AAA matter on November 29, 2012 and January 29, 2013. Those discovery requests and the SOX discovery requests at issue included similar requests for documents, which have only recently been produced. Some of the similar documents requested include: Board minutes and materials, Bebo's notepads and handwritten notes, e-mail correspondence to and from Bebo, and documents relating to Bebo's termination and/or ALC's alleged grounds for termination.

request at the time they were generated"). Because ALC is not entitled to assert the attorney-client privilege over documents generated during Bebo's tenure as CEO, ALC must provide unredacted documents.

To the extent ALC is entitled to assert a privilege against Bebo (which it is not), it has waived the attorney-client privilege by attempting to use the privilege as both a sword and a shield. 3-503 *Weinstein's Federal Evidence* § 503.41. "A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." *Id.* (internal citations omitted). The attorney-client privilege is "implicitly . . . waived when defendant asserts a claim that in fairness requires examination of protected communications." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991); *see also United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("selective disclosure for tactical purposes waives the privilege"). As discussed in further detail below, ALC made regulatory compliance an issue in this case when it asserted that Bebo's failure to address regulatory issues was the ground for her termination. ALC has selectively produced documents dealing with regulatory compliance to support its contention, while redacting portions of those same documents that may support Bebo's position. This use of the attorney-client privilege is self-serving and fairness requires that ALC produce unredacted documents.

Moreover, the redacted portions of the documents are critical to the dispute. ALC contends that the primary basis for its decision to terminate Bebo's employment was her alleged failure to properly address regulatory issues at the company. In order to address these issues, Bebo regularly communicated with ALC's in-house counsel, Mary Zak-Kowalczyk, and ALC's outside counsel in reaching her business decisions. ALC has redacted the advice upon which Bebo relied in reaching her decisions. For example, in the document labeled ALCARB00032599, ALC redacted an email from Zak-Kowalczyk that contained a listing of facilities that either received license revocation letters or were potentially having a license restricted. This redacted language—as well as the redacted language in other communications—is crucial to establish that: (1) ALC was aware of the very issues that it now purports Bebo failed to disclose; and (2) Bebo did not fail to properly address regulatory issues.

ALC claims that Bebo's decisions were improper and harmful to the company but refuses to reveal the communications that served as the basis for these decisions. This is improper. The information Bebo knew, the information ALC's Board knew and when they knew this information is central to the dispute, yet ALC has improperly withheld this information from Bebo. ALC's failure to disclose this information undermines Bebo's ability to properly present evidence critical to her claim. Therefore, ALC should be ordered to produce unredacted documents of all communications to and from Bebo and ALC's in-house and outside counsel. Additionally, ALC must also produce unredacted copies of communications and documents to and from Alan Bell, who advised ALC in his personal capacity as an ALC Board member and not as retained legal counsel.

### **3. ALC Must Produce A Privilege Log.**

In her discovery requests, Bebo specifically requested that:

*If any document is withheld for any reason, including but not limited to any alleged claim of privilege, confidentiality or trade secret, or for any other reason, please provide a description of the document being withheld that includes the following:*

- (a) The date of the document;*
- (b) The author(s) of the document;*
- (c) The recipient(s) of the document;*
- (d) All persons to whom copies of the document have been furnished;*
- (e) The subject matter of the document;*
- (f) The file in which the document is kept in the normal course of business;*
- (g) The current custodian of the document; and*
- (h) The nature of the privilege or other reason for not producing the document and sufficient description of the facts surrounding the contents of the document to justify withholding the document under said privilege or reason.*

(Instruction No. 4.)

ALC objected to this instruction "insofar as it purports to impose obligations beyond those required by 29 C.F.R. § 18 and the Federal Rules of Civil Procedure." This objection is spurious because the Federal Rules of Civil Procedure expressly require ALC to produce a privilege log. *See* Rule 26 (b)(5)(A)(ii), Federal Rules of Civil Procedure (providing that when a party withholds information based on an assertion of privilege, the party must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."). ALC redacted numerous documents on the basis of the attorney-client privilege, and Bebo cannot possibly determine whether the asserted privilege is proper without a privilege log. As such, ALC should be ordered to promptly provide Bebo with a privilege log, and Bebo should be awarded her expenses incurred in bringing this motion.

### **4. ALC Should Be Sanctioned For Its Spoliation Of Critical Evidence.**

As of her termination date, Bebo had hundreds of notepads in her office containing detailed notes regarding meetings, conversations, tasks, goals, etc. These notepads were located in various locations throughout her office: the bulk of the notepads were in the lateral file drawers behind her desk and other notepads were on her desk, on her round table, and on top of

the credenza behind her desk. These notes are of critical importance to Bebo in defending herself against ALC's purported reasons for her termination. Bebo requested these documents in her discovery requests.<sup>3</sup> However, ALC has not produced these notes and counsel for ALC has stated that Bebo's handwritten notepads cannot be located.

It is well established that a party may be sanctioned for spoliation of evidence. *See Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804 (7th Cir. 1995). "A party has a duty to preserve evidence within its control that is essential to a claim or defense in litigation." *Cooper v. United Vaccines, Inc.*, 117 F. Supp. 2d 864, 874 (E.D. Wis. 2000). When a party intentionally breaches this duty to preserve evidence, sanctions may be imposed on the offending party. *Id.* Sanctions for spoliation of evidence include entering judgment on a claim against the party guilty of spoliation. *See, e.g., Allstate*, 53 F.3d at 806-07.<sup>4</sup>

In this case, as a result of ALC's loss or destruction of Bebo's notepads, information that directly contradicts ALC's purported reasons for Bebo's termination has been lost (or destroyed) and cannot be recovered. ALC's loss or destruction of this evidence has severely prejudiced Bebo's ability to pursue her claim against ALC. ALC is responsible for the loss or destruction of Bebo's notes. ALC should be sanctioned for its spoliation of this significant source of evidence. There is no sanction short of entry of judgment against ALC that can adequately address the prejudice Bebo has suffered as a result of ALC's destruction of evidence.

If, however, ALC is, for whatever reason, now able to locate these notepads, then ALC should be ordered to pay Bebo's expenses, including attorney's fees, caused by ALC's failure to promptly produce the requested evidence, including Bebo's costs for filing this motion. *See, e.g., Marquis v. Chrysler Corp.*, 577 F.2d 624, 641 (9th Cir. 1978) ("When a party's conduct during discovery necessitates its opponent's bringing motions which otherwise would have been unnecessary, the court may properly order it to pay the moving party's expenses . . .").

## CONCLUSION

For the foregoing reasons, Bebo respectfully requests that (1) her deposition be stayed to allow her sufficient time to review the newly produced documents; (2) ALC be ordered to reveal the redacted portions of all communications between Bebo and ALC's in-house and outside counsel; (3) ALC be ordered to provide a privilege log; and (4) judgment be entered in her favor due to ALC's spoliation of evidence. Bebo is not requesting an extension on any deadlines other than her deposition. ALC should not benefit from its dilatory tactics by receiving an extension

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<sup>3</sup> Specifically, Bebo requested the following: 7. Produce any and all notepads and/or notebooks containing Ms. Bebo's notes related to her work at ALC.

<sup>4</sup> A lesser sanction is imposing an adverse inference as to the destroyed evidence. *See, e.g., Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002).

Steven L. Gillman, Esq.  
August 26, 2013  
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on its depositions or upcoming hearing dates. Bebo also requests that ALC pay her expenses incurred in bringing this motion.

Yours very truly,



Christopher P. Banaszak

10174181

cc Mr. Thomas A. Arena  
Ms. Elise Kent Bernanke  
Mr. Michael L. Hirschfeld

# **Exhibit D**

# MILBANK, TWEED, HADLEY & M<sup>c</sup>CLOY LLP

1 CHASE MANHATTAN PLAZA  
NEW YORK, NY 10005

212-530-5000

FAX: 212-530-5219

Thomas A. Arena  
Partner  
DIRECT DIAL NUMBER  
212-530-5828  
E-MAIL: [tarena@milbank.com](mailto:tarena@milbank.com)

LOS ANGELES  
213-892-4000  
FAX: 213-629-5063

WASHINGTON, D.C.  
202-835-7500  
FAX: 202-835-7586

LONDON  
44-20-7615-3000  
FAX: 44-20-7615-3100

FRANKFURT  
49-(0)69-71914-3400  
FAX: 49-(0)69-71914-3500

MUNICH  
49-89-25559-3600  
FAX: 49-89-25559-3700

BEIJING  
8610-5969-2700  
FAX: 8610-5969-2707

HONG KONG  
852-2971-4888  
FAX: 852-2840-0792

SINGAPORE  
65-6428-2400  
FAX: 65-6428-2500

TOKYO  
813-5410-2801  
FAX: 813-5410-2891

SÃO PAULO  
55-11-3927-7700  
FAX: 55-11-3927-7777

August 28, 2013

## VIA EMAIL AND FEDERAL EXPRESS

Steven L. Gillman, Esq.  
c/o: Ms. Trenda Benitez  
Manager of ADR Services  
American Arbitration Association

Re: Laurie Bebo v. Assisted Living Concepts, Inc.  
Case No. 51 166 857 12

Dear Mr. Gillman:

We write in response to the letter to you from Mr. Banaszak, counsel for Claimant Laurie Bebo, dated August 26, 2013, seeking various discovery relief, including a stay of Ms. Bebo's deposition (because ALC made a production of documents *in the related OSHA matter* on August 23); an order compelling ALC to produce privileged communications to or from ALC's senior in-house regulatory counsel; an order requiring ALC to provide Ms. Bebo with a privilege log; and sanctions against ALC for the falsely claimed "spoliation" of notebooks from Ms. Bebo's former ALC office (a spurious, made-up issue that was addressed months ago).

It is unfortunate that Mr. Banaszak chose to trouble the Arbitrator in this manner *without first communicating with counsel for ALC*. Had he reached out to us first, at least some of the "disagreements" presented in his letter – including the scheduling of Ms. Bebo's deposition – could have been resolved consensually.

## 1. ALC Has No Objection to Rescheduling Ms. Bebo's Deposition

ALC has received the Arbitrator's email dated August 27, 2013, adjourning Ms. Bebo's deposition, previously scheduled for August 29, 2013. ALC is amenable to rescheduling Ms. Bebo's deposition for a date in late September and would have agreed to do so if asked by Claimant. We recognize that setting Ms. Bebo's deposition for such a date is not consistent with the September 13 discovery cut-off established in the Sixth Amended Scheduling Order. The parties, however, have already agreed, in light of scheduling difficulties, that the deposition of former ALC director Charles Roadman will be conducted on September 18,<sup>1</sup> and a similar accommodation can be made for Ms. Bebo.<sup>2</sup> Neither scheduling will affect the hearing date previously set herein.

We think the Arbitrator should know, however, that the narrative Ms. Bebo presents regarding ALC's production of documents in the OSHA matter is misleading. The deadline to complete document production in the OSHA matter is August 30, 2013. That deadline was set as a result of a scheduling call with the ALJ on August 7, 2013. Thus, all depositions were scheduled by the parties and communicated to the Arbitrator with knowledge of that deadline. ALC's counsel informed Ms. Bebo's counsel that additional production would be made on August 23, and a CD containing that production was sent by FedEx on August 23, for next day delivery. If ALC makes any additional production in the OSHA matter, ALC will do so in accordance with the OSHA deadline.<sup>3</sup>

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<sup>1</sup> The parties had been directed to submit to the Arbitrator an agreed deposition schedule by no later than August 14, 2013. On that date, Claimant added Mr. Roadman to her list of former ALC personnel she wished to examine.

<sup>2</sup> On August 13, 2013 – with full knowledge that ALC had until August 30, 2013 to produce documents in the OSHA matter – Claimant proposed two dates for Ms. Bebo's deposition: August 29 and September 5. ALC chose the former, because the latter came in the middle of the Rosh Hashanah holiday, and ALC was already set to prepare a witness that day for examination by Ms. Bebo on September 6. Ms. Bebo's counsel informed us that he has a conflict during the week of September 9-13, and hence the present need to move Ms. Bebo's deposition into the second half of September.

<sup>3</sup> Ms. Bebo's current complaint about the scheduling of her deposition is consistent with her behavior since the inception of discovery. Initially, Ms. Bebo refused to respond for months to multiple requests from ALC's counsel for available dates on which her deposition could be scheduled – while simultaneously demanding that ALC commit to deposition dates for its directors and employees. Later, Ms. Bebo played other scheduling games to ensure that her deposition was set for a date *after* she had taken the depositions of the key ALC witnesses.

**2. ALC Has Properly Asserted the Attorney-Client Privilege With Respect to Communications to and from its In-House Regulatory Counsel; Ms. Bebo's Assertions to the Contrary Misstate the Law and the Facts**

Citing *Gottlieb v. Wiles*, 143 F.R.D. 241, 246-47 (D. Colo. 1992), Ms. Bebo broadly argues that ALC cannot assert the attorney-client privilege against her with respect to privileged documents and communications generated during her tenure as CEO. The holding in *Gottlieb*, which relies on a “joint client” theory that presumes the corporation and its officer are joint clients of the counsel supplying legal advice to the corporation, represents a minority view that has been largely discredited and is not applied in the Seventh Circuit. A concise exposition of the flaws in *Gottlieb* and the other cases applying the minority rule appears in *Gilday v. Kenra, Ltd.*, 2010 WL 3928593 at \*2-\*4 (S.D. Ind. 2010), citing *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 276-77 (N.D. Ill. 2004), and *Montgomery v. eTreppid Techs., LLC*, 548 F.Supp.2d 1175, 1186-87 (D. Nev. 2008). These cases apply the majority rule, which is that the privilege at all times belongs to the corporation, and a former control group member no longer in the corporation’s employ has no power to waive the privilege and no power to use privileged communications against her former employer. The Arbitrator should apply the majority rule here.

Ms. Bebo alternatively argues that even if ALC would otherwise be entitled to assert the privilege, ALC waived the privilege as to communications between Ms. Bebo and ALC’s senior in-house regulatory counsel concerning “regulatory compliance” by the purported selective disclosure of same. Ms. Bebo’s attempt to suggest that ALC is using the privilege as both “sword and shield” through its redactions of certain documents fails. In order to make out a claim of waiver, Ms. Bebo would have to show that ALC, through its redactions, deliberately and selectively divulged, and is using, *privileged* information about regulatory compliance in order to buttress its case. See *Shinnecock Indian Nation v. Kempthorne*, 652 F. Supp. 2d 345, 363 (E.D.N.Y. 2009) (“the production of a document in redacted form does not automatically waive the protection as to its whole or to related documents”). Ms. Bebo has not identified a single instance in which ALC has disclosed a privileged communication concerning this topic.<sup>4</sup> ALC has redacted *all* privileged portions of the relevant documents, and the claim in Ms. Bebo’s letter boils down to a complaint that ALC did so and produced only the non-privileged content. This plainly is *not* the selective use of privilege as both “sword and shield.” Claimant likewise is not entitled to break the privilege because of her speculation that the redacted material

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<sup>4</sup> Where an email chain contained a privileged communication of legal advice or a request for legal advice, that communication was redacted, and the remainder of the email chain, consisting of non-privileged information, was produced, with all privilege redactions properly noted. Similarly, minutes of meetings that included descriptions of privileged communications were redacted to remove the privileged content, with the remainder produced.

“may support Bebo’s position.” *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994) (“Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.”).

Finally, Ms. Bebo – as she has attempted in every proceeding involving her conduct at ALC – asserts that anything she may have done was based upon the advice of counsel, and claims that she is thereby entitled to disclose and use to her advantage all of ALC’s privileged communications with in-house and outside counsel.<sup>5</sup> Now, Ms. Bebo argues that ALC waived the privilege by asserting that one reason for her termination was the regulatory hot water in which ALC found itself in 2012, and the revelation that the serious deficiencies cited by the regulators in 2012 had persisted uncorrected *since 2009 and 2010*. Ms. Bebo surely cannot contend that counsel advised her not to report material matters to the ALC Board, or that, assuming she received such “advice,” her purported adherence to it is at all credible.

If the Arbitrator were to credit Ms. Bebo’s assertion of waiver, then there would be almost no instance in which a corporation could prevent disclosure of its privileged communications by a former employee charged with some misconduct. The former employee would simply need to assert that he or she acted on the basis of advice received from the corporation’s lawyers, the privilege would be lost, and an attempt would be made to use the legal advice against the corporation.

### **3. Ms. Bebo Is Not Entitled To A Privilege Log**

Ms. Bebo’s complaint that ALC has improperly failed to produce a privilege log is misleading, to put it mildly, and appears to have been calculated to support her request to delay her deposition. First, ALC long ago explained to Ms. Bebo that it would not incur the burden and expense of creating a privilege log, and Ms. Bebo never disagreed – until her letter of August 26. ALC, many months ago, produced to Ms. Bebo over 30,000 pages of documents in the arbitration, without a request for a privilege log. The redactions for privilege in the document productions in this matter were made in a manner consistent with those in the most recent OSHA production that Ms. Bebo now questions. Claimant is trying to change the rules in the middle of the game.

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<sup>5</sup> In the related OSHA matter, Ms. Bebo’s complaint alleges that in recommending that ALC make certain disclosures in a public filing, she was acting on advice of counsel. Likewise, in the pending securities class action, Ms. Bebo asserted as an affirmative defense that she relied upon advice of ALC’s counsel. If Ms. Bebo’s assertions are to be credited, she did very little, if anything, during her tenure at ALC except follow advice of counsel.

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August 28, 2013

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Second, and in any event, the redacted documents at issue, in the vast majority of instances, already display virtually all of the information that would have been included on a privilege log (*e.g.*, sender(s), recipient(s), date, and the facts surrounding the contents of the communication). Indeed, ALC provided far more information by producing redacted documents than it would have had it withheld in their entirety all documents containing any privileged communication and simply listed such documents on a log.

**4. ALC Has Produced All Relevant Portions of Ms. Bebo's Approximately Two Dozen Legal Pads, And Her Suggestion of "Spoliation" of "Hundreds" of "Notebooks" is False**

Ms. Bebo's claim that ALC lost or destroyed "hundreds" of "notebooks" containing "critical evidence" is, in a word, outrageous. The relevant facts are as follows:

- all materials in Ms. Bebo's office were preserved in a locked conference room at ALC's headquarters (as we have previously explained to the Arbitrator and Ms. Bebo's counsel) until they were shipped to Milbank Tweed for review;
- the materials included legal pads, not "notebooks";
- the legal pads numbered 23, not "hundreds," along with some loose individual sheets; and
- the vast majority of the pads and sheets contain information that bears no relationship to this matter.

On May 13, 2013, the Arbitrator instructed us to produce only those pages of the legal pads that contain material responsive to Ms. Bebo's document requests. On July 14, 2013, ALC produced those documents. Ms. Bebo's charge of spoliation is therefore entirely baseless.

\* \* \*

Arbitration is intended to be an efficient and inexpensive method for resolving disputes. Ms. Bebo, however, continues to engage in the gamesmanship and wars of attrition that often characterize litigation in courts of law, and that originally led parties to

Steven L. Gillman, Esq.  
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develop ADR procedures. Ms. Bebo's latest round of claims against ALC is an abuse of the discovery process, and should be rejected.

Respectfully submitted,

*Thomas A. Arena (by JDW)*

Thomas A. Arena

cc: Christopher P. Banaszak, Esq.

# **Exhibit E**

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-16293



**In the Matter of**

**LAURIE BEBO, and  
JOHN BUONO, CPA,**

**Respondents.**

**RESPONDENT LAURIE BEBO'S  
REQUEST FOR ISSUANCE OF  
SUBPOENAS DUCES TECUM**

TO: Benjamin J. Hanauer, Esq.  
United States Securities and  
Exchange Commission  
175 West Jackson Boulevard, Suite 900  
Chicago, IL 60604

Pursuant to Rule 232 of the Commission's Rules of Practice, Ryan S. Stippich and Mark A. Cameli of Reinhart Boerner Van Deuren s.c., as counsel for Respondent Laurie Bebo, request issuance of Subpoenas Duces Tecum to Assisted Living Concepts, LLC doing business as Enlivant, Milbank, Tweed, Hadley & McCloy LLP, Ventas, Inc. and Quarles & Brady LLP (the "Witnesses"), requiring the production of documentary or other tangible evidence returnable at a designated time or place.

In relation thereto, Respondent Laurie Bebo states as follows:

1. The documents possessed by the Witnesses are material and relevant to the subject matter of this proceeding.
2. Assisted Living Concepts, LLC doing business as Enlivant is Respondent's former employer at all times relevant to these proceedings.

3. Milbank, Tweed, Hadley & McCloy LLP is the law firm that Assisted Living Concepts, LLC retained to internally investigate the facts underlying these proceedings.

4. Ventas, Inc. is a party to the leasing agreement that is central to these proceedings.

5. Quarles & Brady LLP is the law firm that Assisted Living Concepts, LLC retained for corporate and litigation matters involving Assisted Living Concepts, LLC and relevant to this proceeding.

6. Respondent Laurie Bebo believes that the Witnesses have custody, possession and control of documents and testimony related to the subject matter of this action and it is necessary that a Subpoena issue to each Witness.

7. Pursuant to Section 556 of the Administrative Procedures Act; as amended (5 U.S.C. § 556), and Rules 111 and 232 of the Rules of Practice of the United States Securities and Exchange Commission (17 C.F.R. §§ 201.111, 201.232), a subpoena may issue to a witness to appear, to produce certain documents and to give testimony in these proceedings.

8. The issuance of subpoenas to the Witnesses is not unreasonable, oppressive, excessive in scope, or unduly burdensome.

9. Copies of the proposed Subpoenas Duces Tecum to the Witnesses and the requested documents are attached hereto as Exhibits A -D showing that the requests are reasonable in scope.



UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING  
File No. 3-16293

In the Matter of

LAURIE BEBO, and  
JOHN BUONO, CPA,

Respondents.

SUBPOENA *DUCES TECUM* TO  
PRODUCE DOCUMENTS

TO: Assisted Living Concepts, LLC d/b/a Enlivant  
330 North Wabash Avenue, Suite 3700  
Chicago, IL 60611

TAKE NOTICE: By authority of Section 556 of the Administrative Procedures Act, as amended (5 U.S.C. § 556), and Rules 111 and 232 of the Rules of Practice of the United States Securities and Exchange Commission (17 C.F.R. §§ 201.111, 201.232), and upon an application for subpoena made by Respondent Laurie Bebo;

YOU ARE HEREBY ORDERED to produce the documents, electronically stored information, or objects described below, and permit their inspection, copying, testing or sampling. Documents must be produced to Reinhart Boerner Van Deuren s.c., 1000 North Water Street, Suite 1700, Milwaukee, Wisconsin, 53202, on or before February 2, 2015. The U.S. Securities and Exchange Commission's Rules of Practice require that any application to quash or modify a subpoena comply with Commission Rule of Practice 232(e)(1) (17 C.F.R. § 201.232(e)(1)).

## DEFINITIONS AND INSTRUCTIONS

1. You are instructed to produce documents and/or electronically stored information evidencing, commemorating, reflecting and/or relating to the following list.

2. Unless otherwise specified, the relevant time frame is January 1, 2007 to the present.

3. The terms "Assisted Living Concepts, Inc.," and "ALC" refer to Assisted Living Concepts, Inc. and includes (a) all of its affiliates, divisions, units, successor and predecessor entities, subsidiaries, parents, and assigns, including but not limited to Assisted Living Concepts, LLC (d/b/a Enlivant); (b) all of its present and former officers, directors, agents, employees, representatives, accountants, investigators, and attorneys; (c) any other person acting or purporting to act on its behalf; or (d) any other person otherwise subject to its control, which controls it, or is under common control with it.

4. The term "CaraVita Facilities" refers to the eight independent and assisted living facilities located in several states in the Southeast United States ALC rented from Ventas, and include CaraVita Village, Greenwood Gardens, Highland Terrace, Peachtree Estates, Tara Plantation, The Inn at Seneca, the Sanctuary, and Winterville Retirement.

5. "Communication" means any oral, written, electronic, or other transfer of information, ideas, opinions or thoughts by any means, from or to any person or thing.

6. "Including" means "including without limitation."

7. "Relate to," "related to" and "relating to," mean mentioning or describing, containing, involving or in any way concerning, pertaining or referring to or resulting from, in whole or in part, directly or indirectly, the stated subject matter.

8. The terms "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these requests any document or thing which might otherwise be construed to be outside their scope.

9. "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, writings, drawings, graphs, charts, photographs, sound records, images, electronic or computerized data compilations and other electronically stored information, and any versions, drafts or revisions of any of the above. Any document which contains any comment, notation, addition, insertion or marking of any kind which is not part of another document which does not contain a comment, notation, addition, insertion or marking of any kind which is part of another document, is to be considered a separate document.

10. "Electronically stored information" means all information that is created, manipulated, or stored in electronic form regardless of the medium. Electronically stored information also includes any deleted data that once existed as live data but has been erased or deleted from the electronic medium on which it resided. Even after deleted data itself has been overwritten or wiped, information relating to the deleted data may still remain.

11. A document or thing is deemed to be in your control if you have the right to secure the document or thing or a copy thereof from another person or entity having actual possession of the document or thing. If any document or thing responsive to this request was, at one time, but is no longer, within your possession or control, state what disposition was made of the document or thing, by whom, the approximate date of the disposition, and the reason for the disposition.

12. If any request for documents is deemed to call for the production of privileged or work product materials and such privilege or work product is asserted, provide the following information with respect to each withheld document:

- (a) the privilege(s) and/or work product protection asserted;
- (b) the date on which the document was created or finalized;
- (c) the number of pages, including any attachments or appendices;
- (d) the names of the document's author, authors or preparers;
- (e) the name of each person to whom the document was sent, carbon copied or blind carbon copied;
- (f) the subject matter of the document or responses, and in the case of any document relating or referring to a meeting or conversation, identification of such meeting or conversation.

#### DOCUMENTS TO BE PRODUCED

1. All documents referring or relating to how the documents, files, notes, and other ALC property located in Ms. Bebo's office at ALC's headquarters in Menomonee Falls, Wisconsin were collected, preserved, and/or destroyed after she ceased being employed by ALC on May 29, 2012, including but not limited to certain legal-style note pads that Ms. Bebo prepared and compiled during the course of her employment and maintained in her office (hereafter referred to as "Ms. Bebo's Notepads") and her copies of materials provided to ALC's board of directors (or any committee thereof) in advance of or in connection with meetings of the board or any committee that were maintained in her office in three-ring binders along with her notes from those meetings (hereafter referred to as "Ms. Bebo's Board Books").

2. Documents sufficient to identify the chain of custody of Ms. Bebo's Notepads and Ms. Bebo's Board Books after she ceased being employed by ALC on May 29, 2012, including but not limited to any records reflecting the transmission of Ms. Bebo's Notepads and Ms. Bebo's

Board Books to the law firm of Milbank, Tweed, Hadley & McCloy LLP ("Milbank") and from Milbank to the law firm of Ropes & Gray LLP.

3. All documents referring or relating to the current location of any of Ms. Bebo's handwritten notes she prepared in the course of her employment at ALC, including but not limited to Ms. Bebo's Notepads and Ms. Bebo's Board Books.

4. All documents and correspondence related to the collection, retention, destruction or transfer of Ms. Bebo's ALC documents after she ceased being employed by ALC on May 29, 2012 up until the present.

5. All documents referring or relating to any discussions or plans to destroy any of the documents, files, notes, and other ALC property located in Ms. Bebo's office at ALC's headquarters prior to the time Ms. Bebo ceased being employed by ALC, including but not limited to Ms. Bebo's Notepads and Ms. Bebo's Board Books.

6. All documents and correspondence relating to any action that led to the destruction of any of Ms. Bebo's handwritten notes she prepared in the course of her employment at ALC, whether inadvertent or intentional.

7. Telephone records reflecting calls made to or from Ms. Bebo's office telephone [(262) 257-8899] from January 1, 2008 through the date she ceased being employed by ALC on May 29, 2012.

8. Telephone records reflecting calls made to or from Ms. Bebo's ALC-provided mobile telephone [(414) 803-6111] from January 1, 2008 through the date she ceased being employed by ALC on May 29, 2012.

9. Documents sufficient to show Robin (Birr) Herbner's annual salary and benefits at the time she left ALC's employ.

10. Documents sufficient to show Sean Schelfout's annual salary and benefits at the time he left ALC's employ.
11. A complete copy of Ms. Bebo's outlook e-mail box, exported into a ".pst" file for January 1, 2007 to May 29, 2012.
12. A complete copy of Ms. Bebo's outlook calendar, exported to a ".pst" file for January 1, 2007 to May 29, 2012.
13. A copy of Joy Zaffke's outlook calendar, exported to a ".pst" file for the time period January 1, 2009 to March 31, 2009.
14. Produce for inspection and imaging the hard drive from the laptop(s) computer utilized by Ms. Bebo for her work on behalf of ALC at the time she ceased being employed by ALC on May 29, 2012.
15. Documents reflecting commercial airplane tickets paid for ALC employees (whether purchased directly, through a travel agent, or employee reimbursement) to travel to the States of Alabama, Florida, Georgia, or South Carolina, including but not limited to documents sufficient to identify for each ticket the employee flying on the airplane, the flight dates, the departing airport, and the arriving airport.
16. Expense reports for any employee who is listed on any of the occupancy reconciliation reports related to the CaraVita Facilities.
17. Documents reflecting job descriptions for the position held by any employee who is listed on any of the occupancy reconciliation reports related to the CaraVita Facilities.
18. All documents that support the following statement made in ALC's Form 10-Q, filed with the Commission on November 8, 2012 for the quarter ending September 30, 2012:

"The previously disclosed internal investigation being conducted by the Board of Directors has been completed. The Board has determined not to take any action."

19. All documents relating to interviews of witnesses in connection with the internal investigation, including any notes, memoranda, or summaries of the same.

20. Any reports, memoranda, or presentation materials related to any conclusions of the internal investigation, including but not limited to any materials related to presentations to the Board, a committee of the board, the SEC, or any other third party.

21. All documents reflecting communications between the entity referred to as "Party K/Party L" in ALC's Schedule 14A proxy statement filed with the Commission on or about April 8, 2013 and ALC, or anyone acting on ALC's behalf, relating to the basis for any changes in "Party K/Party L's" bid to purchase ALC during the time period April 1, 2012 to September 1, 2012.

22. Documents sufficient to identify "Party K/Party L."

23. The document index for the 350 boxes of hard copy documents collected by ALC, as described in Section I.E. of the attached letter from Asheesh Goel to Scott Tandy dated March 27, 2014 (attached as Exhibit A).

24. Produce for inspection at a mutually agreeable place and time the 350 boxes referred to in the same letter (Ex. A).

25. Produce each and every one of the "over 5,400 email communications between Milbank and ALC's former Board" as described in Section II.A. of Exhibit A.

26. Hard copies of board materials provided to Ms. Bebo while she was still employed by ALC, as referred to in Section III.H. of Ex. A.
27. Documents sufficient to show a full listing of all properties owned or leased by ALC for year-end 2011.
28. Documents sufficient to show the net book value for all properties owned or leased by ALC for year-end 2011.
29. Documents sufficient to show the revenue for all properties owned or leased by ALC for year-end 2011.
30. Documents sufficient to show the net operating income for all properties owned or leased by ALC for year-end 2011.
31. Documents sufficient to show a full listing of all properties owned or leased by ALC for year-end 2012.
32. Documents sufficient to show the net book value for all properties owned or leased by ALC for year-end 2012.
33. Documents sufficient to show the revenue for all properties owned or leased by ALC for year-end 2012.
34. Documents sufficient to show the net operating income for all properties owned or leased by ALC for year-end 2012.

Dated this \_\_\_\_ day of January, 2015.

By: \_\_\_\_\_  
The Honorable Cameron Elliot  
Administrative Law Judge



ROPES & GRAY LLP  
191 NORTH WACKER DRIVE  
32nd FLOOR  
CHICAGO, ILLINOIS 60606-4302  
WWW.ROPESGRAY.COM

March 27, 2014

Asheesh Goel



**FOIA CONFIDENTIAL TREATMENT REQUESTED**

**VIA EMAIL and HAND DELIVERY**

Scott B. Tandy, Senior Attorney  
U.S. Securities and Exchange Commission  
Chicago Regional Office  
175 West Jackson Boulevard, Suite 900  
Chicago, IL 60604

Re: **In the Matter of Assisted Living Concepts, Inc. (C-7948)**

Dear Mr. Tandy:

On behalf of Assisted Living Concepts, LLC ("ALC"), I write regarding your request for an update on ALC's response to subpoena, email and oral requests from the U.S. Securities and Exchange Commission ("SEC"). In furtherance of ALC's continued cooperation, the following is our second written update of the status of your remaining requests.<sup>1</sup> We welcome the opportunity to discuss this matter with you further.

**I. SEC Subpoena Requests**

Below is a brief summary of the status of ALC's responses to the Staff's requests for documents in connection with two subpoenas issued to ALC dated October 22, 2013 and October 30, 2013.



<sup>1</sup> Our first written update was sent to you on February 25, 2014. See letter from Asheesh Goel to Scott Tandy (Feb. 25, 2014).

Confidential Treatment Requested by Assisted Living Concepts, LLC

A. Board Minutes and Packages (May 29, 2012 – July 11, 2013). We have located additional materials responsive to this request and will be making a production shortly. We continue to search for additional Board minutes and packages and if located, they will be produced to the Staff.

B. Ms. Bebo's Notebooks. As previously described, all notebooks in ALC's possession that have been identified as belonging to Ms. Bebo were produced to the Staff on January 17, January 24 and February 14, 2014.

C. Email Communications from January 1, 2008 to May 7, 2012. As previously described, we continue to work on identifying responsive email communications for 21 custodians. On February 20, 2014, we began reviewing these documents with the assistance of 25 contract attorneys. We will produce responsive documents from this set on a rolling basis. Our first production of documents from this set was made on March 21, 2014 and we anticipate that our productions from this set of documents will be complete in early April 2014.

D. Emails Communications from May 7, 2012 to September 13, 2012. As previously described, we worked with Target Litigation to collect email communications from ALC backup tapes for 21 custodians. We anticipate that any responsive documents in this category will be produced in May 2014, earlier than we previously anticipated.

E. Email Communications from September 13, 2012 to July 11, 2013. As previously described, we worked with ALC to collect email communications from ALC's email archive system for 21 custodians. We anticipate that any responsive documents in this category will be produced in May 2014, earlier than we previously anticipated.

F. Arbitration Deposition Transcripts and Exhibits. As previously described, we have already produced all documents responsive to this request.

G. Hard Copy Boxes from ALC. As previously described, with the assistance of 15 contract paralegals, we indexed over 350 hard copy boxes collected by ALC and identified nearly 100,000 pages of documents for review. We anticipate that any responsive documents in this category will be produced in May 2014, earlier than we previously anticipated.

H. Direct Collection. For a number of your subpoena requests, we will work directly with appropriate ALC personnel, in conjunction with ALC's Legal and IT departments, to identify and collect responsive documents. We would welcome a discussion with you about how we may streamline this process.

## II. Email and/or Verbal SEC Requests

Below is a brief summary of the status of ALC's responses to your email and/or verbal requests for documents or information.

A. Milbank's Communications with ALC's Former Board of Directors. As previously described, Milbank provided us with over 5,400 email communications between Milbank and ALC's former Board. We have completed our review of these documents and have provided each director with the communications that he or she sent or received.

Furthermore, you inquired whether the confidentiality agreements entered into with the SEC, dated November 18, 2013 and February 25, 2014 (collectively, "Confidentiality Agreements"), would permit production of Milbank's communications with the former Board Members of ALC. While ALC is willing to waive its attorney-client privilege (if any) with respect to such documents, see Section IV, ALC's production of such documents to the Staff is dependent upon the former directors waiving any attorney-client privilege that may have existed between Milbank and the Board or between Milbank and any former directors individually. We understand that counsel for each of the former directors would like discuss this issue directly with you.

B. Documents Previously Produced as Redacted by Milbank. As previously described, on January 10, 2014, Milbank provided us with means to identify the un-redacted versions of 780 documents that Milbank produced to the Staff with redactions. We have reviewed these documents and on February 20, 2014, we produced to the Staff un-redacted copies of 623 documents that are responsive to the SEC's subpoenas. During the week of February 24, 2014, we produced an additional 157 documents.

C. Documents Previously Withheld as Privileged by Milbank. As previously described, on January 16, 2014, we received from Milbank 4,873 communications previously withheld as privileged. We have reviewed these documents and on February 20, 2014, we produced to the Staff un-redacted copies of 4,004 documents that are responsive to the SEC's subpoenas. During the week of February 24, 2014, we further produced an additional 35 documents. The remaining documents were determined to be non-responsive to the SEC's subpoenas.

Confidential Treatment Requested by Assisted Living Concepts, LLC

March 27, 2014

D. Grant Thornton's Documents Previously Withheld as Privileged. As previously described, on January 6, 2014, Grant Thornton LLP ("Grant Thornton") provided us with documents that it withheld as privileged at Milbank's direction. Pursuant to the Privilege Waiver Letter and the Confidentiality Agreements, we have directed Grant Thornton to produce these documents to the Staff.

E. Internal Auditor's Report. You requested a copy of Dave Hokeness' internal audit report presented at a Board meeting in the second quarter of 2012 and a copy of Mr. Hokeness' revised internal audit report following the second quarter Board meeting. Pursuant to your request, we have identified the report presented at the Board meeting for the second quarter of 2012 as the Internal Auditor's Report to the Audit Committee, dated August 2, 2012, a copy of which was produced to the Staff on January 17, 2014. ALC\_SEC00005816 - ALC\_SEC00005828.

In our letter to you dated February 25, 2014, we noted that to ALC's knowledge, the revised report you requested is the report presented by Mr. Hokeness to the Audit Committee on November 1, 2012, a copy of which was produced to the Staff on January 17, 2014. ALC\_SEC00006193 - ALC\_SEC00006206. In connection with the document review described in Section I.D, we recently identified a document that Mr. Hokeness referred to, in an email to Mary Zak Kowalczyk, as the updated version of his report to the Audit Committee. This document will be produced to the Staff during the week of March 24, 2014.

F. Employee Data. You also asked ALC for the number of ALC employees who worked at or out of the corporate headquarters and the number of ALC employees who worked at a regional or divisional level, for the years ending 2009 - 2011. ALC identified relevant documents and produced them to the Staff on February 28, 2014. ALC\_SEC00056289 - ALC\_SEC00056302.

G. William Bowen. You asked for documents relating to William Bowen's consulting work for ALC, including the date range of his service and his address. We have gathered check requests, W-9s, correspondence, and payment information relating to Bowen's consulting work for ALC and we produced these documents to the Staff February 28, 2014. ALC\_SEC00056245 - ALC\_SEC00056288. ALC will also produce additional responsive documents if any become available.

Confidential Treatment Requested by Assisted Living Concepts, LLC

H. Employee List. On November 15, 2013, we produced to the Staff a list of employees (the "Employee List"). You asked for the name of the person or entity that drafted the list and for a description of the underlying documents used to create the list. We understand that Milbank created this list by requesting information from ALC's Director of Information Technology, Tim Bates. Mr. Bates, in turn, worked with various ALC staff members to gather the information requested by Milbank.

You also asked whether an ALC employee could authenticate the chart for use by the SEC at trial. We believe that Milbank is in the best position to authenticate its own work product but we welcome a discussion with you about this request. For information about the specific individual at Milbank that created this list, we suggest you contact Daniel Perry at Milbank.

I. Expense Analysis. On November 15, 2013, we produced to the Staff an analysis of expense reports ("Expense Analysis Chart"). You asked for the name of the person or entity that drafted this analysis and for a description of the underlying documents used to create them. We understand that Milbank created this analysis. For information about the specific individual at Milbank that created this analysis, we suggest you contact Daniel Perry at Milbank. We produced to the Staff copies of the underlying travel and expense records, as well as job descriptions of various ALC positions, on February 28, 2014. ALC\_SEC00060310 - ALC\_SEC00065267.

You further asked whether ALC could provide an affidavit attesting to the authenticity of the travel and expense records produced to the Staff. ALC will provide an affidavit stating that these records were kept in the ordinary course of ALC's business activity. Given recent employee turnover at ALC, we are working to identify an appropriate affiant.

J. Engagement Letters. You asked for copies of engagement letters between Milbank and ALC, its Board of Directors or its Audit Committee. We produced these materials to you on March 5, 2014. ALC\_SEC00065382 - ALC\_SEC00065395.

K. Milbank's Representation. You asked about ALC's belief as to the scope of Milbank's representation of ALC, its Board of Directors or its Audit Committee. ALC, as it exists today, has no position on the scope of such representation, beyond what Milbank has already stated.

L. Ms. Bebo's Laptop. You asked whether ALC has any information about Michael Hirschfeld's statement in an OSHA filing that indicated Ms. Bebo may have deleted information from her laptop between May 2, 2012 and May 8, 2012. We believe that Mr. Hirschfeld is in the best position to explain the basis for his statement.

Confidential Treatment Requested by Assisted Living Concepts, LLC

March 27, 2014

You further asked whether ALC could find out what material, if any, had been deleted from Ms. Bebo's laptop between May 2 - 8, 2012. At our direction, FTI forensically analyzed the image of Ms. Bebo's laptop, taken on May 8, 2012, for any evidence that files had been deleted during the relevant time period. FTI found evidence indicating that system and/or temporary internet files had been deleted during the relevant time period. FTI did not, however, identify any evidence indicating that any business files (including, but not limited to, Word, PowerPoint, Excel, PDF files) had been deleted during the relevant time period.

M. Shareholder and Derivative Action Deposition Transcripts and Exhibits. You asked ALC to produce copies of all transcripts of testimony (including, but not limited to, deposition and trial testimony) relating to the stockholder derivative action filed in the Circuit Court, Milwaukee County, for the State of Wisconsin captioned George Passaro v. Laurie A. Bebo, et al., 12-CV-010106 or the five stockholder actions filed in the Eight Judicial District court of the State of Nevada and for Clark County and consolidated under the caption In re Assisted Living Concepts, Inc. Shareholder Litigation, Case No. A-12-6754054-C (consolidated with Case Nos. A-13-677683-C, A-13-677797-C, A-13-677838-C, and A-13-677902-C) (the "Nevada Actions"). According to Milbank, no deposition or trial testimony occurred in these actions.

N. Request Related to ALC SEC00012602. You asked for an original copy of the first email, and attachments thereto, in an email chain previously produced by ALC. ALC\_SEC00012602. As discussed in Section II.A of this letter, ALC's production of certain documents to the Staff is dependent upon its former directors waiving any attorney-client privilege that may have existed between Milbank and the Board or between Milbank and any former directors individually. Per our discussion, we understand that you will contact the appropriate Directors' counsel to discuss this issue.

O. Notes of Board and Audit Committee Meetings. You asked for certain categories of handwritten notes, including handwritten notes from the Board of Director and Audit Committee meetings prior to November 2010 and between May 2012 and May 2013. We have thus far identified four sets of such handwritten notes from the relevant time period, all of which were previously produced to you the week of January 13, 2014. ALC\_SEC00002597 - ALC\_SEC00002604; ALC\_SEC00002607 - ALC\_SEC00002611; ALC\_SEC00005242 - ALC\_SEC00005244; ALC\_SEC00005251 - ALC\_SEC00005254. We will produce any additional responsive handwritten notes on a rolling basis as we identify them.

Confidential Treatment Requested by Assisted Living Concepts, LLC

March 27, 2014

P. Requests Related to ALC SEC00055819 - ALC SEC00055820. You requested a copy of a document with the file name "ALC new letter.docx" that was attached to the bottom email in the email chain found at ALC\_SEC00055820. We do not have a copy of the requested document. For your reference, ALC previously produced another document titled "ALC new letter.docx." ALC00150684.

You also requested a copy of a document that was attached to the top email in the email chain found at ALC\_SEC00055819. We continue to work on this request.

Q. Peachtree Estates Marketing Director. You asked about the identity of the Sales and Marketing Director for Peachtree Estates from January 2009 through July 2010. We informed you on March 13, 2014 that the Marketing Director from January 23, 2009 to July 16, 2010 was William Hudson.

In addition, you asked for Mr. Hudson's last known address and his social security number. We believe his last known address was 159 J D Dr, Chickamauga, GA, 30707.

You further asked whether ALC is going to retain counsel to represent him if the SEC wishes to speak with Mr. Hudson. ALC is considering this request.

R. Laurie Bebo's Expense Reports. You asked for copies of Laurie Bebo's expense reports from Q4 2008 through Q1 2012. We are in the process of gathering these documents and will provide them to you promptly.

S. Contact Information. You asked for the home addresses of David Hennigar, Mel Rhineland, Alan Bell and Malen Ng. This question should be directed to respective counsel for each of these individuals.

T. Request related to ALC 000158650 - ALC 000158651. You asked for an un-redacted copy of ALC\_000158650 - ALC\_000158651. On March 26, we informed you that the un-redacted copy could be found at ALC\_SEC00044899 - ALC\_SEC00044900.

U. Request related to ALC 000146301. You asked for an un-redacted copy of ALC\_000146301. The un-redacted copy can be found at ALC\_SEC00040354.

### III. Requests from Laurie Bebo's Counsel

As you requested, below is a brief summary of all document requests by Mark Cameli, counsel to Laurie Bebo.

Confidential Treatment Requested by Assisted Living Concepts, LLC

March 27, 2014

A. Documents Produced to SEC. As previously described, from January 16 - 20, 2014, we provided Mr. Cameli with copies of certain documents relating to Ms. Bebo that had been previously produced to the Staff by Milbank in connection with the above-referenced matter. Specifically, the documents produced to the SEC included (a) Ms. Bebo's emails, (b) documents collected from Ms. Bebo's laptop, and (c) documents collected from Ms. Bebo's individual network share at ALC.

B. Ms. Bebo's Notebooks. As previously described, on January 29, 2014 and February 14, 2014, we provided Mr. Cameli with copies of Ms. Bebo's notebooks that ALC produced to the Staff. In addition, we made the corresponding original notebooks available to Mr. Cameli at a meeting on December 11, 2013 and to Ms. Bebo and Mr. Cameli at meetings on January 27, January 31 and February 17, 2014.

C. Notes from the Arbitration Proceeding. As previously described, Mr. Cameli asked us for approximately 400-500 pages of notes that were used and/or provided in the arbitration proceeding captioned In the Matter of Arbitration Between Laurie Bebo, Claimant, and Assisted Living Concepts, Inc., Respondent, AAA No.: 51 166 00857 12. Mr. Goel informed Mr. Cameli that we do not possess these documents.

D. Ventas Production. As previously described, Mr. Cameli asked us for a copy of a production by Ventas Realty LP ("Ventas") in the case filed in the United States District Court for the Eastern District of Wisconsin captioned Robert E. Lifson, Individually and on Behalf of All Other Similarly Situated v. Assisted Living Concepts, Inc. and Laurie Bebo, Case No. 2:12-cv-00884. Mr. Goel informed Mr. Cameli that we do not possess these documents.

E. Computer Image. As previously described, Mr. Cameli asked us for a copy of Ms. Bebo's laptop hard drive that was preserved by ALC. Mr. Goel declined to grant this request. As noted in Section III.A, all documents from Ms. Bebo's laptop that have been produced to the Staff have also been provided to Mr. Cameli.

F. Phone Records. As previously described, Mr. Cameli asked us for a copy of Ms. Bebo's phone records. Mr. Goel declined to grant this request.

G. Index of Hard Copy Records. Mr. Cameli asked us for a copy of ALC's index of hard copy records collected in connection with the SEC investigation. ALC is considering this request.

H. Laurie Bebo's Board Materials. Mr. Cameli asked us for copies of Board materials that Ms. Bebo received while still employed by ALC. ALC is gathering these materials and will provide them to Mr. Cameli when complete.

Confidential Treatment Requested by Assisted Living Concepts, LLC

March 27, 2014

I. Disclosure Committee Minutes. Mr. Cameli asked us for copies of disclosure committee minutes from 2009-2012. ALC is considering this request.

J. Eric Fonstad's Notes. Mr. Cameli asked us for copies of Mr. Fonstad's handwritten notes. ALC is considering this request.

K. Employee List and Expense Analysis. Mr. Cameli asked us for copies of the Employee List and Expense Analysis Chart that ALC produced to the SEC on November 15, 2013. ALC is considering this request.

L. Expense Reports. Mr. Cameli asked us for copies of Laurie Bebo's and John Buono's Expense Reports. We will provide Mr. Cameli with copies of Ms. Bebo's expense reports.

#### IV. Waiver of Attorney-Client Privilege

Another item you requested was a revised waiver of ALC's attorney-client privilege. As previously described, we provided the Privilege Waiver Letter to the Staff on February 4, 2014, in which ALC waived its attorney-client privilege regarding certain topics.

#### V. Advice of Counsel Defense

You also asked whether the ALC's former directors or management intend to assert advice of counsel as a defense when asked about disclosures in ALC's 2012 Form 10-Q and Form 10-K filings regarding: (1) the internal investigation; (2) whether ALC had a material weakness or significant deficiency in internal controls in light of the employee leasing arrangement; or (3) whether ALC needed to restate prior financials in light of the employee leasing arrangement. This question should be directed to respective counsel for ALC's former directors or management.

#### VI. Representation of Certain ALC Personnel

You asked whether Ropes & Gray LLP would represent Eric Fonstad or Mary Zak-Kowalczyk. James W. Ducayet, from Sidley Austin LLP, has previously represented Ms. Zak-Kowalczyk in this matter and will continue to do so. John F. Hartmann, from Kirkland & Ellis LLP, will represent Mr. Fonstad in this matter.

You also asked whether Kathy Bucholtz is being represented, and if so, by whom. Pravin Rao, from Perkins Coie LLP, will represent Ms. Bucholtz in this matter.

Confidential Treatment Requested by Assisted Living Concepts, LLC

March 27, 2014

We appreciate the opportunity to assist the Staff in its investigation and look forward to continuing to work with you in a collaborative fashion.

\* \* \* \* \*

Please be advised that this letter and the enclosed materials contain confidential, commercial, financial, or personal information, the disclosure of which would cause significant harm, economic or otherwise, to ALC and its affiliates and employees. Pursuant to Rule 83 of the Commission's Rule on Information and Requests, 17 C.F.R. § 200.83, we hereby request on behalf of ALC that this letter and the enclosed materials, and the contents of this letter and the enclosed materials, be accorded confidential treatment and not be disclosed in response to any request under the Freedom of Information Act, 5 U.S.C. § 552. In order to ensure confidentiality of the enclosed materials, they have been clearly marked "Confidential Treatment Requested by Assisted Living Concepts, LLC." If this letter, the enclosed documents, or any of the contents of this letter or enclosed documents is the subject of a Freedom of Information Act request, please inform me and I will provide further substantiation of this request for confidential treatment. Finally, we request that these documents, as well as any copies made thereof, be returned to us, as counsel for ALC, upon conclusion of the Commission's examination.

Best regards,

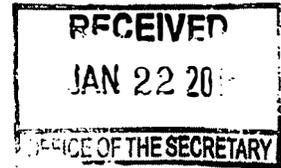


Asheesh Goel

cc: FOIA Office  
100 F Street NE, Mail Stop 2736  
Washington, DC 20549

Confidential Treatment Requested by Assisted Living Concepts, LLC

# **Exhibit F**



UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-16293

In the Matter of

LAURIE BEBO, and  
JOHN BUONO, CPA

Respondents.

RESPONDENT LAURIE BEBO'S  
SUBMISSION IN RESPONSE TO THE  
DIVISION'S POSITION REGARDING  
HER REQUEST FOR SUBPOENAS

Respondent Laurie Bebo submits the following response to the Division of Enforcement's (the "Division's") Response to the Court's Order Regarding Subpoenas to Produce:

*First*, the Division does not object to the issuance of the subpoenas. Consequently, the subpoenas should issue forthwith. Given the delay in their issuance, the response date of February 2, 2014 may need to be modified (to February 9, 2015), or alternatively Ms. Bebo's counsel will work with the subpoenaed non-parties so that documents will be produced on timely basis but alleviating any undue burden on the non-parties to meet production deadlines. However, the highly accelerated pace of the administrative process necessarily requires those subject to document subpoenas to respond at a prompt but reasonable pace.<sup>1</sup>

*Second*, the Division asserts that "it appears" Ms. Bebo's subpoenas are excessive in scope and that much of the material sought is "irrelevant." (Division's Resp. to Court's Order, ¶ 1.) The Division provides no explanation for its assertions, and they are incorrect. Although the Division may believe that it has already requested and produced the "relevant" documents, it was

<sup>1</sup> Ms. Bebo does not waive and continues to assert her objection to these proceedings, including but not limited to her constitutional objections, as set forth in more detail in her Answer and Affirmative Defenses to the Order Instituting Proceedings, which Ms. Bebo incorporates by reference.

the Division—Ms. Bebo's adversary—who had the opportunity to decide which documents to request (or not). And the determination of the relevance of information as to Ms. Bebo's defense must be left to Ms. Bebo and her counsel, not the government. Rather, the subpoenas seek critical exculpatory information from the non-parties, and are tailored to obtain, among other things, (1) evidence that will support Ms. Bebo's theory of the case; (2) information to impeach the testimony of witnesses formerly of ALC and currently or formerly of Ventas; and (3) information related to the apparent destruction of Ms. Bebo's notes she took while she was employed at ALC.<sup>2</sup>

*Third*, although it seems clear that the information sought by Ms. Bebo is subject to the broad waiver of privilege set forth in Exhibit 1 to the Division's response, the Division still asserts that "much of the material sought" is privileged. The subpoenas are prepared to focus on information and documents subject to that privilege waiver. The information that the Division chose not to request, allegedly on the grounds of privilege, was likely a strategic determination during the investigation because the Division understood that the information would not support its narrative of the case. This is the very information Ms. Bebo is seeking, and it is neither privileged nor irrelevant.

For example, Ms. Bebo is seeking to subpoena documents from Milbank Tweed related to an internal investigation after which ALC's Board of Directors determined that there was no need for corrective action related to the very disclosures at issue in this case. Indeed, Milbank

---

<sup>2</sup> Ms. Bebo was a meticulous note-taker during the course of her employment, typically on legal pads, but also in her board books. Based on the notes that were produced in the course of the Division's investigation and as part of the investigative file, there appear to be pages removed from her note pads and entire pads missing. Moreover, Ms. Bebo believes that a substantial number of note pads were not produced, and she has the right to inquire about their whereabouts. Although a significant number of notepads were produced by the company— and appear to be part of the investigative file— there were virtually no notes related to the matters pertinent to the allegations in the OIP. The missing notes include those from Ms. Bebo's key conversations with other witnesses in the case, including personnel from Ventas and members of ALC's Board of Directors. Other witnesses will corroborate that these notes of key conversations existed in the months prior to her termination and even provide certain details about the content of those notes. Ms. Bebo has averred this spoliation as an affirmative defense in her Answer.

Tweed summarized the results of its investigation for the company's auditors, including the following findings:

- After an extensive investigation that "Milbank was not able to conclude that the Company was not in compliance with the lease
- Milbank communicated with Ventas regarding this issue and Ventas representatives were unable to communicate to Milbank that they had not agreed to the arrangement (employee rented units). Current management of Ventas could not confirm nor deny whether the arrangement was authorized or unauthorized."
- Statements of witnesses as reported in the investigation are inconsistent with statements given to the SEC.

(See Ex. A to Milbank Tweed Subpoena.) In a case where the appropriate legal standard is whether there was any reasonable basis to conclude that ALC was in compliance with its lease with Ventas (*see Virginia Bankshares v. Sandberg*, 501 U.S. 1083 (1991); *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 111 (2d Cir. 2011); *Zaluski v. United American Healthcare Corp.*, 527 F.3d 564 (6th Cir. 2008), this is critical evidence to Ms. Bebo's defense.

Milbank Tweed represented Assisted Living Concepts, Inc., its Audit Committee, and its Board of Directors (as a whole) with respect to ALC's internal investigation in 2012-13 regarding the lease disclosures made by ALC. Milbank Tweed did not represent the individual Board members with respect to the internal investigation. Indeed, Milbank Tweed informed the Division of the scope of this representation on March 4, 2014, in response to a request from the Division. A copy of that correspondence is attached hereto, as Exhibit A. Further, ALC specifically waived its attorney-client privilege with respect to communications occurring between January 1, 2012 and March 14, 2013 between ALC Executives (defined to include members of the Board) and Milbank Tweed regarding the internal investigation, among other things. (See Division's Resp. to Court's Order, Ex. 1.)

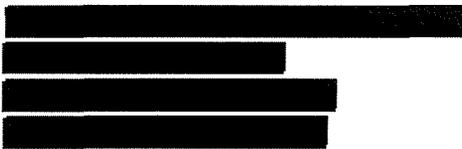
The Division asserts that it did not subpoena Milbank Tweed "in part due to privilege issues" related to waivers from the individual Board members regarding their communications with Milbank Tweed relating to the internal investigation. (*See id.*, ¶ 4.) But Milbank Tweed did not assert that it represented the Board members in their individual capacities with respect to the internal investigation. (*See Exhibit A at SEC-Internal-E-0002998-99.*) And ALC specifically waived privilege with respect to its communications related to the internal investigation. (*See Division's Resp. to Court's Order, Ex. 1.*) Whether the Division chose to subpoena documents, or why it did not, should have no bearing on whether Ms. Bebo has the opportunity to access exculpatory information. There is no reason why Ms. Bebo should now be denied an opportunity to subpoena documents that would support her defense.

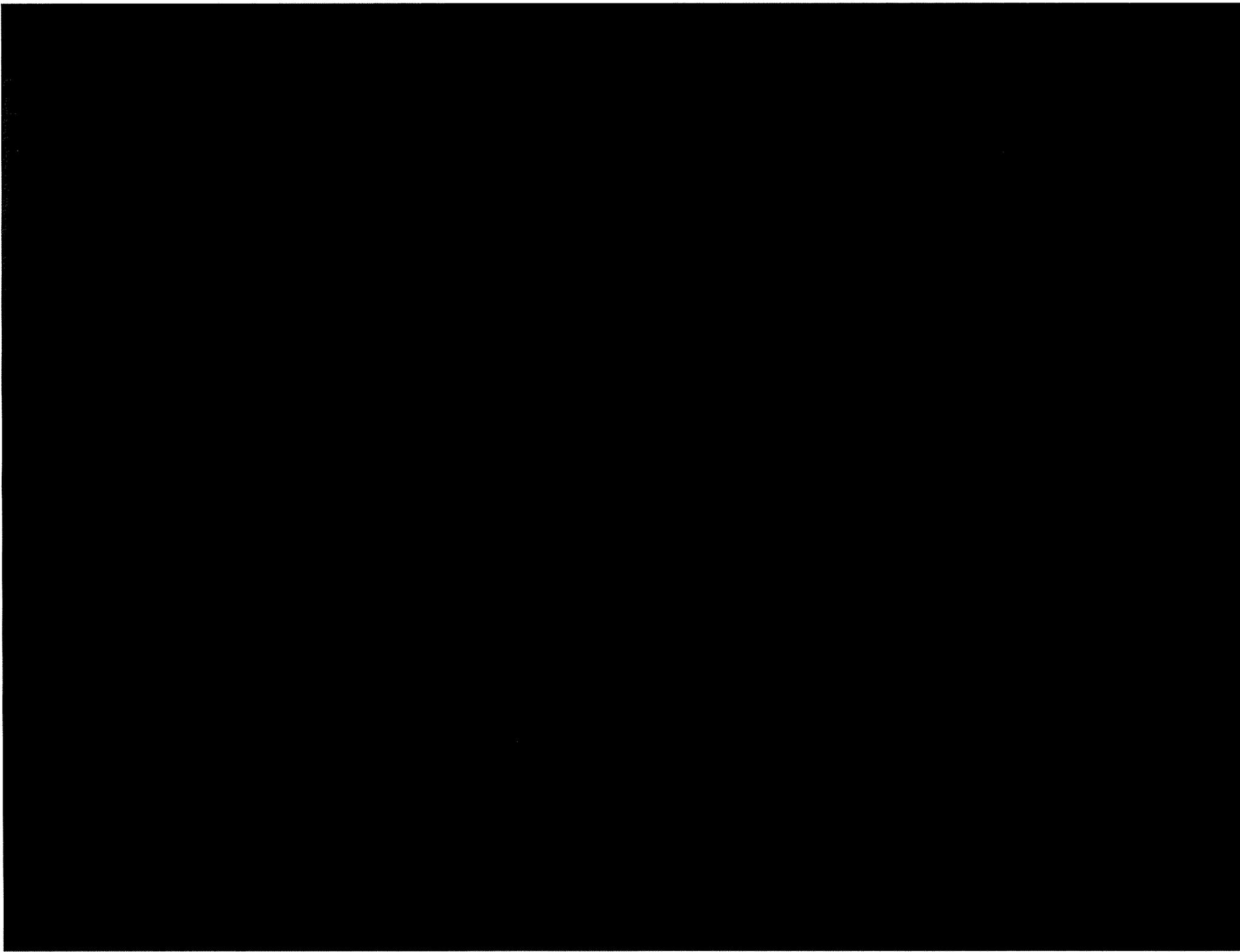
Dated this 21st day of January, 2015.

REINHART BOERNER VAN DEUREN S.C.  
Counsel for Respondent Laurie Bebo

By:  \_\_\_\_\_

Mark A. Cameli  
WI State Bar No.:   
E-mail:   
Ryan S. Stippich  
IL State Bar No.:   
E-mail: 





Dated this 21st day of January, 2015.

REINHART BOERNER VAN DEUREN S.C.  
Counsel for Respondent Laurie Bebo

By: \_\_\_\_\_

  
Ryan S. Stippich

IL State Bar No.: 6276002

\_\_\_\_\_  
Telephone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

E-mail: [rstippich@reinhardt.com](mailto:rstippich@reinhardt.com)

**From:** Perry, Daniel [REDACTED]  
**Sent:** Tuesday, March 04, 2014 7:30 PM  
**To:** Tandy, Scott B.  
**CC:** Hanauer, Benjamin J.; Javorski, Jean M.; Kerstetter, Charles J.; Nichols, Lynette; Vincus, Thomas E.;  
Goel, Asheesh  
**Subject:** RE: ALC (C-7948)  
**Attachments:** [Untitled].pdf

Scott:

Our response to your email below is attached.

Dan

---

**Daniel M. Perry | Milbank**  
One Chase Manhattan Plaza | New York, NY 10005  
T: +1 212 530 5083 | F: +1 212 622 5093  
[dperry@milbank.com](mailto:dperry@milbank.com) | [www.milbank.com](http://www.milbank.com)

**From:** Tandy, Scott B. [REDACTED]  
**Sent:** Friday, February 28, 2014 2:48 PM  
**To:** Perry, Daniel  
**Cc:** Hanauer, Benjamin J.; Javorski, Jean M.; Kerstetter, Charles J.; Nichols, Lynette; Vincus, Thomas E.  
**Subject:** ALC (C-7948)

Dan:

I am wondering whether you can answer a question for me.

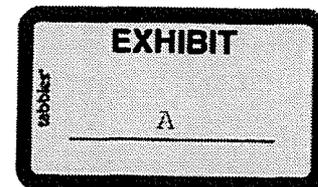
Specifically, I am wondering whether Milbank represented: (1) ALC's Audit Committee as a whole; (2) ALC's Board of Directors as a whole; (3) ALC, the company; (4) any or all of the directors on ALC's Board of Directors individually; and/or (5) any or all of ALC's employees individually.

And, can you let me know the beginning and end dates for each of the representations?

It would be helpful if you could provide this information to me fairly quickly.

Thanks, Scott

Scott Tandy  
Senior Attorney  
U.S. Securities and Exchange Commission  
Chicago Regional Office  
175 W. Jackson Blvd., Ste. 900  
Chicago, IL 60614  
[REDACTED]  
[REDACTED]



=====  
IRS Circular 230 Disclosure: U.S. federal tax advice in the foregoing message from Milbank, Tweed, Hadley & McCloy

LLP is not intended or written to be, and cannot be used, by any person for the purpose of avoiding tax penalties that may be imposed regarding the transactions or matters addressed. Some of that advice may have been written to support the promotion or marketing of the transactions or matters addressed within the meaning of IRS Circular 230, in which case you should seek advice based on your particular circumstances from an independent tax advisor.  
=====

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**MILBANK, TWEED, HADLEY & McCLOY LLP**

**1 CHASE MANHATTAN PLAZA**

**NEW YORK, N.Y. 10005-1413**

**212-530-5000**

**FAX: 212-530-5219**

**DANIEL M. PERRY**

**PARTNER**

**DIRECT DIAL NUMBER**

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**FAX: 212-922-5093**

**E-MAIL: dperry@milbank.com**

**BELJING**

**8610-5969-2700**

**FAX: 8610-5969-2707**

**HONG KONG**

**852-2971-4888**

**FAX: 852-2840-0792**

**SINGAPORE**

**65-6428-2400**

**FAX: 65-6428-2500**

**TOKYO**

**813-5410-2801**

**FAX: 813-5410-2891**

**SÃO PAULO**

**55-11-3927-7700**

**FAX: 55-11-3927-7777**

**LOS ANGELES**

**213-892-4000**

**FAX: 213-629-5063**

**WASHINGTON, D.C.**

**202-835-7500**

**FAX: 202-835-7586**

**LONDON**

**44-20-7615-3000**

**FAX: 44-20-7615-3100**

**FRANKFURT**

**49-69-71914-3400**

**FAX: 49-69-71914-3500**

**MUNICH**

**49-89-25559-3600**

**FAX: 49-89-25559-3700**

March 4, 2014

**VIA EMAIL**

Scott Tandy, Esq.  
Senior Attorney  
U.S. Securities & Exchange Commission  
Chicago Regional Office  
175 W. Jackson Blvd., Suite 900  
Chicago, IL 60614

Re: Assisted Living Concepts, Inc. (C-7948)

Dear Scott:

I write on behalf of Milbank, Tweed, Hadley & McCloy LLP (the "Firm"), in response to your email of February 28, 2014 requesting information regarding legal representation of Assisted Living Concepts, Inc. ("ALC" or the "Company").

Below is the information you requested regarding the Firm's representation of the Company, members of its Board of Directors, and others. This information is based solely on the Firm's records and discussion with the Firm's attorneys. The Firm has not conferred with its former clients in responding to your request for information. Accordingly, the Commission should not rely solely on any of the information below to make a determination about the extent and nature of the Firm's representation of the various persons and entities discussed below. *See, e.g., Merck Eprova AG v. ProThera, Inc.*, 670 F.Supp.2d 201, 210 (S.D.N.Y. 2009) (citations omitted) ("The formation of an

Scott Tandy, Esq.  
March 4, 2014  
Page 2

attorney-client relationship hinges upon the client's reasonable belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice. No special formality is required to demonstrate the establishment of the relationship."); *see also* 23 Williston on Contracts §62:3 (4th ed.) (attorney-client relationship may be implied by conduct of the parties). The Firm's specific response to your questions is set forth below:

**(1) ALC's Audit Committee as a whole.**

The Firm represented ALC's Audit Committee with respect to the Company's investigation regarding certain lease disclosures by ALC (the "Internal Investigation"). That representation began in May 2012 and concluded in November 2013.

**(2) ALC's Board of Directors as a whole.**

The Firm represented the ALC Board of Directors as a whole in relation to the Company's Internal Investigation. That representation began in July 2012 (after Ms. Bebo was removed from the Board of Directors) and concluded in November 2013.

**(3) ALC, the Company.**

The Firm represented ALC in relation to the SEC's currently ongoing investigation ("SEC Investigation"). That representation began in June 2012 and concluded in November 2013.

The Firm also represented ALC in relation to a stockholder derivative action styled *George Passaro v. Laurie A. Bebo, et al.*, 12 CV 010106, filed in the Circuit Court, Milwaukee County, for the State of Wisconsin (the "Passaro Action"). That representation began shortly after the Company was named as a defendant in that action in September 2012 and concluded after the action was dismissed in June 2013.

The Firm represented ALC in relation to five stockholder actions filed in the Eighth Judicial District Court for the State of Nevada and for Clark County and consolidated under the caption *In re Assisted Living Concepts, Inc. Shareholder Litigation*, Case No. A-12-6754054-C (consolidated with Case Nos. A-13-677683-C, A-13-677797-C, A-13-677838-C, and A-13-677902-C) (the "Nevada Actions"). That representation began shortly after the Company was named as a defendant in the first of these actions in December 2012 and concluded after the actions were settled in April 2013.

In addition, the Firm represented the Company in relation to a securities class action styled *Robert E. Lifson, individually and on behalf of all others similarly situated, plaintiff, against Assisted Living Concepts, Inc. and Laurie A. Bebo, defendants*, Case No. 12-cv-884, filed in the United States District Court for the Eastern District of Wisconsin. That representation began shortly

after the Company was named as a defendant in August 2012 and concluded after the action was dismissed in December 2013.

The Firm also represented ALC in actions filed against the company by Laurie Bebo:

- On June 29, 2012, Laurie Bebo filed an action against the Company styled *Bebo v. Assisted Living Concepts, Inc.*, Case No. 2012CV002039, in the Circuit Court, Waukesha County, for the State of Wisconsin. The Firm's representation began shortly after the action was filed and concluded after the action was dismissed in June 2013.
- On June 29, 2012, Laurie Bebo filed an arbitration demand against the Company with the American Arbitration Association, Case No. 51 166 857 12 (the "Bebo Arbitration"). The Firm's representation began shortly after the arbitration demand was filed and concluded after the demand for arbitration was dismissed in October 2013.
- On July 26, 2012, Laurie Bebo filed a purported Sarbanes-Oxley whistleblower complaint under Section 806 of the Sarbanes-Oxley Act with the U.S. Department of Labor Occupational Safety and Health Administration ("OSHA"), identified by the file name "Assisted Living Concepts/Bebo/5-3100-12-045" (the "Bebo SOX Action"). The Firm's representation began in October 2013, when OSHA first informed the Company that the complaint had been filed, and concluded after the complaint was dismissed in November 2013.
- On May 15, 2013, the State of Wisconsin, Department of Work Force Development, Equal Rights Division notified the Company that in March 2013 Laurie Bebo had filed a retaliation complaint under the State of Wisconsin's Elder Abuse/Healthcare Worker laws. The Firm's representation began shortly after the Company was notified of the complaint and concluded after the complaint was dismissed in November 2013.

**(4) Any or all of the directors on ALC's Board of Directors individually.**

The Firm represented the individual members of the ALC Board of Directors (other than Bebo) in relation to the Passaro Action and the Nevada Actions. That representation was concurrent with The Firm's representation of the Company in those actions.

In addition, in connection with the Firm's representation of the Company in the Bebo Arbitration and the Bebo SOX Action, the Firm defended certain individual members of the ALC Board of Directors at depositions in those matters. The individual directors were witnesses appearing

Scott Tandy, Esq.  
March 4, 2014  
Page 4

on behalf of the Company at the Company's direction/request and were no longer on the Board of Directors at the time they appeared.

The Firm also represented the individual members of the ALC Board of Directors (other than Bebo) in relation to the SEC Investigation. That representation began in the Spring of 2013, at the time of the SEC's oral request for documents from the directors, and concluded in November 2013.

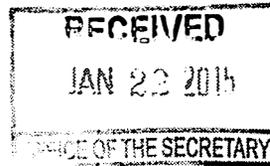
**(5) Any or all of ALC's employees individually.**

The Firm has not represented any ALC employees individually.

If you have any questions, please do not hesitate to contact me by phone at (212) 530-5083, or via email at [dperry@milbank.com](mailto:dperry@milbank.com).

Sincerely,

  
Daniel M. Perry



[REDACTED]

January 21, 2015

DELIVERED BY COURIER

Brent J. Fields, Secretary  
Office of the Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Dear Mr. Fields:

Re: In the Matter of Laurie Bebo and John  
Buono, CPA  
AP File No. 3-16293

I enclose for filing in the above-referenced matter an original and three copies of Respondent Laurie Bebo's Submission in Response to the Division's Position Regarding Her Request for Subpoenas, and Certificate of Service.

Thank you for your assistance.

Yours very truly,

  
Ryan S. Stippich

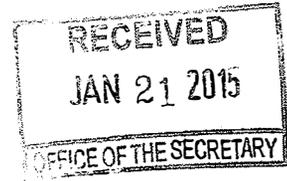
29416622RSS:amb

Encs.

cc The Honorable Cameron Elliot (w/enc.)  
Patrick S. Coffey, Esq. (w/enc.)  
Benjamin J. Hanauer, Esq. (w/enc.)  
Scott B. Tandy, Esq. (w/enc.)  
Ms. Christina Zaroulis Milnor (w/enc.)

# **Exhibit G**

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



**ADMINISTRATIVE PROCEEDING**

**File No. 3-16293**

**In the Matter of**

**LAURIE BEBO, and  
JOHN BUONO, CPA,**

**Respondents.**

**THE DIVISION OF ENFORCEMENT'S  
RESPONSE TO THE COURT'S ORDER  
REGARDING SUBPOENAS TO PRODUCE**

The Division of Enforcement ("Division") responds as follows to the Court's January 15, 2015 Order Regarding Subpoenas to Produce:

1. The Division does not object to the subpoenas that Respondent Bebo requests be issued to ALC, Ventas, Milbank Tweed, and Quarles & Brady (the "Subpoenas").<sup>1</sup> Nevertheless, it appears that the Subpoenas are excessive in scope, and that much of the material sought by the Subpoenas is irrelevant to these proceedings, privileged (by the attorney-client privilege and/or work product doctrine), or both.

2. In regards to whether the materials sought by the Subpoenas have already been produced to Bebo, the Division initially notes that, pursuant to Rule 230(a), it previously produced to Bebo all documents that it received from ALC, Ventas, Milbank Tweed, and Quarles & Brady in the course of its investigation.

---

<sup>1</sup> Quarles & Brady was ALC's primary outside counsel during the period at issue in the OIP. ALC retained Milbank Tweed – to, among other things, conduct an internal investigation – after its board of directors received a whistleblower complaint alleging misconduct consistent with the allegations in these proceedings.

3. While it would be impracticable to review every document in its files to determine if the Subpoenas seek documents already produced to Bebo, the Division has undertaken to compare the requests in the Subpoenas with its general understanding of the documents in its files obtained from ALC, Ventas, Milbank Tweed,<sup>2</sup> and Quarles & Brady. Based on this review, the Division believes that its files contain, and that it produced to Bebo, at least some documents responsive to the following requests: (a) ALC Subpoena paragraphs 15, 16, 17, 20, and 26; (b) Ventas Subpoena paragraphs 5 and 15; (c) Milbank Tweed Subpoena paragraphs 11, 14, and 15; and (d) Quarles & Brady Subpoena paragraphs 5, 6, 7, and 9.

4. Regarding the Court's inquiries about privilege waivers, attached hereto as Exhibit 1 is a February 4, 2014 letter from ALC's counsel in which ALC generally waives the attorney-client privilege relating to the subject matter of these proceedings. The Division notes that while ALC generally waived the attorney-client privilege, the Division did not receive privilege waivers from the individual members of ALC's board of directors, in particular regarding the directors' communications with Milbank Tweed relating to the internal investigation. For these and other reasons, the Division did not subpoena materials from Milbank Tweed.<sup>3</sup>

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<sup>2</sup> The Division has not issued any subpoenas to Milbank Tweed, in part due to privilege issues described below. The only documents that the Division received from Milbank Tweed were materials it received at presentations made by Milbank Tweed attorneys to the Division staff. The Division has produced all such documents to Bebo.

<sup>3</sup> While not necessarily applicable to the Subpoenas, the Division submits that Ms. Bebo has waived the attorney-client privilege – to the extent she (as opposed to ALC) had the ability to assert the privilege – consistent with her advice-of-counsel affirmative defense and her disclosure of attorney-client communications in the course of her testimony.

Respectfully submitted:

Dated: January 20, 2015



---

Benjamin J. Hanauer  
Division of Enforcement  
U.S. Securities and Exchange Commission  
175 West Jackson Blvd, Suite 900  
Chicago, IL 60604

[REDACTED]  
[REDACTED]

# EXHIBIT 1



ROPE & GRAY LLP  
191 NORTH WACKER DRIVE  
32nd FLOOR  
CHICAGO, ILLINOIS 60606-4302  
WWW.ROPEGRAY.COM

February 4, 2014

Asheesh Goel  
T +1 312 845 1217  
F +1 312 845 5513  
asheesh.goel@ropesgray.com

**FOIA CONFIDENTIAL TREATMENT REQUESTED**

**VIA E-MAIL AND HAND DELIVERY**

Scott B. Tandy, Senior Attorney  
U.S. Securities and Exchange Commission  
Chicago Regional Office  
175 West Jackson Boulevard, Suite 900  
Chicago, IL 60604

Re: **In the Matter of Assisted Living Concepts, Inc. (C-7948)**

Dear Mr. Tandy:

As you know, we represent Assisted Living Concepts, LLC. Pursuant to Section 4.3 of the SEC Enforcement Manual, consistent with ALC's desire to cooperate fully with your investigation referenced above and pursuant to the request made by the Staff of the Enforcement Division of the U.S. Securities and Exchange Commission, ALC agrees to waive its attorney-client privilege with respect to certain limited communications, as follows:

- 1) ALC agrees to waive its attorney-client privilege with respect to communications:
  - a. occurring between December 1, 2008 and May 8, 2013;
  - b. between ALC directors or officers ("Executives"), on the one hand, and ALC's legal counsel, on the other hand;
  - c. involving advice that ALC Executives sought from any of those lawyers; and

- 2 -

units  
including

be

January  
associated  
in

making  
Ventas Lease covenants.

- 2) ALC further agrees to waive its attorney-client privilege with respect to certain limited communications:
  - a. occurring between January 1, 2012 and March 14, 2013;
  - b. between ALC Executives, on the one hand, and ALC's legal counsel, on the other hand;
  - c. involving advice that ALC Executives sought from any of those lawyers; and
  - d. that relate to disclosures or contemplated disclosures regarding: (i) an internal investigation; (ii) whether ALC had any material weaknesses or significant deficiencies in its internal controls; or (iii) whether ALC needed to restate its financials.
  
- 3) ALC further agrees to waive its attorney-client privilege with respect to certain limited communications:
  - a. between ALC Executives, on the one hand, and ALC's legal counsel, on the other hand;

---

<sup>1</sup> The Cara Vita facilities include Cara Vita Village, Greenwood Gardens, Highland Terrace, Peachtree Estates, Tara Plantation, The Inn at Seneca, The Sanctuary, and Winterville Retirement.

February 4, 2014

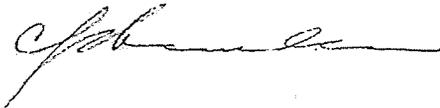
- b. involving advice that ALC Executives sought from any of those lawyers; and
- c. that relate to ALC's response to a letter from the SEC's Division of Corporation Finance to ALC, dated July 21, 2011.

We appreciate the opportunity to assist the Staff in its investigation and look forward to continuing to work with you in a collaborative fashion.

\* \* \* \* \*

Please be advised that this letter and the enclosed materials contain confidential, commercial, financial, or personal information, the disclosure of which would cause significant harm, economic or otherwise, to ALC and its affiliates and employees. Pursuant to Rule 83 of the Commission's Rule on Information and Requests, 17 C.F.R. § 200.83, we hereby request on behalf of ALC that this letter and the enclosed materials, and the contents of this letter and the enclosed materials, be accorded confidential treatment and not be disclosed in response to any request under the Freedom of Information Act, 5 U.S.C. § 552. In order to ensure confidentiality of the enclosed materials, they have been clearly marked "Confidential Treatment Requested by Assisted Living Concepts, LLC." If this letter, the enclosed documents, or any of the contents of this letter or enclosed documents is the subject of a Freedom of Information Act request, please inform me and I will provide further substantiation of this request for confidential treatment. Finally, we request that these documents, as well as any copies made thereof, be returned to us, as counsel for ALC, upon conclusion of the Commission's examination.

Best regards,



Asheesh Goel

cc: FOIA Office  
100 F Street NE, Mail Stop 2736  
Washington, DC 20549

# **Exhibit H**



ROPE & GRAY LLP  
191 NORTH WACKER DRIVE  
32nd FLOOR  
CHICAGO, ILLINOIS 60606-4302  
WWW.ROPEGRAY.COM

February 4, 2014

Asheesh Goel  
T +1 312 845 1217  
F +1 312 845 5513  
asheesh.goel@ropesgray.com

**FOIA CONFIDENTIAL TREATMENT REQUESTED**

**VIA E-MAIL AND HAND DELIVERY**

Scott B. Tandy, Senior Attorney  
U.S. Securities and Exchange Commission  
Chicago Regional Office  
175 West Jackson Boulevard, Suite 900  
Chicago, IL 60604

**Re: *In the Matter of Assisted Living Concepts, Inc. (C-7948)***

Dear Mr. Tandy:

As you know, we represent Assisted Living Concepts, LLC. Pursuant to Section 4.3 of the SEC Enforcement Manual, consistent with ALC's desire to cooperate fully with your investigation referenced above and pursuant to the request made by the Staff of the Enforcement Division of the U.S. Securities and Exchange Commission, ALC agrees to waive its attorney-client privilege with respect to certain limited communications, as follows:

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  - a. occurring between December 1, 2008 and May 8, 2013;
  - b. between ALC directors or officers ("Executives"), on the one hand, and ALC's legal counsel, on the other hand;
  - c. involving advice that ALC Executives sought from any of those lawyers; and

Confidential Treatment Requested by Assisted Living Concepts, LLC

- d. that relate to (i) the leasing of units in CaraVita facilities<sup>1</sup> to employees or others, including independent contractors, former employees, relatives of employees and friends of employees (collectively, "Employees"), (ii) whether Employees could be included as occupants for purposes of occupancy covenant calculations under the terms of the Amended and Restated Master Lease Agreement between and among Ventas Realty, Limited Partnership and affiliates of ALC, dated January 1, 2008 (the "Ventas Lease"), (iii) whether revenue associated with occupancy by Employees could be included in coverage ratio calculations under the Ventas Lease, or (iv) any disclosures ALC made or contemplated making in Commission filings regarding its compliance with the Ventas Lease covenants.
- 2) ALC further agrees to waive its attorney-client privilege with respect to certain limited communications:
    - a. occurring between January 1, 2012 and March 14, 2013;
    - b. between ALC Executives, on the one hand, and ALC's legal counsel, on the other hand;
    - c. involving advice that ALC Executives sought from any of those lawyers; and
    - d. that relate to disclosures or contemplated disclosures regarding: (i) an internal investigation; (ii) whether ALC had any material weaknesses or significant deficiencies in its internal controls; or (iii) whether ALC needed to restate its financials.
  - 3) ALC further agrees to waive its attorney-client privilege with respect to certain limited communications:
    - a. between ALC Executives, on the one hand, and ALC's legal counsel, on the other hand;

---

<sup>1</sup> The CaraVita facilities include CaraVita Village, Greenwood Gardens, Highland Terrace, Peachtree Estates, Tara Plantation, The Inn at Seneca, The Sanctuary, and Winterville Retirement.

February 4, 2014

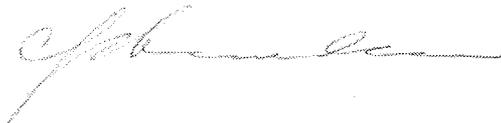
- b. involving advice that ALC Executives sought from any of those lawyers; and
- c. that relate to ALC's response to a letter from the SEC's Division of Corporation Finance to ALC, dated July 21, 2011.

We appreciate the opportunity to assist the Staff in its investigation and look forward to continuing to work with you in a collaborative fashion.

\* \* \* \* \*

Please be advised that this letter and the enclosed materials contain confidential, commercial, financial, or personal information, the disclosure of which would cause significant harm, economic or otherwise, to ALC and its affiliates and employees. Pursuant to Rule 83 of the Commission's Rule on Information and Requests, 17 C.F.R. § 200.83, we hereby request on behalf of ALC that this letter and the enclosed materials, and the contents of this letter and the enclosed materials, be accorded confidential treatment and not be disclosed in response to any request under the Freedom of Information Act, 5 U.S.C. § 552. In order to ensure confidentiality of the enclosed materials, they have been clearly marked "Confidential Treatment Requested by Assisted Living Concepts, LLC." If this letter, the enclosed documents, or any of the contents of this letter or enclosed documents is the subject of a Freedom of Information Act request, please inform me and I will provide further substantiation of this request for confidential treatment. Finally, we request that these documents, as well as any copies made thereof, be returned to us, as counsel for ALC, upon conclusion of the Commission's examination.

Best regards,



Asheesh Goel

cc: FOIA Office  
100 F Street NE, Mail Stop 2736  
Washington, DC 20549

# **Exhibit I**



ROPE & GRAY LLP  
191 NORTH WACKER DRIVE  
32nd FLOOR  
CHICAGO, ILLINOIS 60604-4302  
WWW.ROPEGRAY.COM

February 25, 2014



C.J. Kerstetter  
United States Securities and Exchange Commission  
Chicago Regional Office  
Suite 900  
175 West Jackson Boulevard  
Chicago, IL 60604

Re: In the Matter of Assisted Living Concepts, Inc. (C-7948)

Dear Mr. Kerstetter:

In light of the interest of the Staff of the U.S. Securities and Exchange Commission (the "Staff") in determining whether there have been any violations of the federal securities laws in connection with the above-referenced matter, and Assisted Living Concepts, LLC's ("ALC") interest in investigating and analyzing the circumstances and people involved in the events at issue, ALC has provided and may provide to the Staff additional copies of reports, interview memoranda, investigative working papers, oral briefings, and/or other documents or information regarding the above-referenced matter ("Confidential Materials"). The term "Confidential Materials" shall also include any reports, interview memoranda, investigative working papers, oral briefings, and/or other documents or information regarding the above-referenced matter, including documents or information regarding conversations between Grant Thornton LLP ("Grant Thornton") and Milbank, Hadley, Tweed & McCloy LLP or any other legal counsel to ALC, which have been or may be provided to the Staff by Grant Thornton in connection with the above-referenced matter.

Please be advised that by producing the Confidential Materials pursuant to this agreement, ALC does not intend to waive the protection of the attorney work product doctrine, the attorney-client privilege, or any other privilege applicable as to third parties. ALC believes that the Confidential Materials are protected by, at a minimum, the attorney work product doctrine and the attorney-client privilege. ALC believes that the Confidential Materials warrant protection from disclosure.

The Staff will maintain the confidentiality of the Confidential Materials pursuant

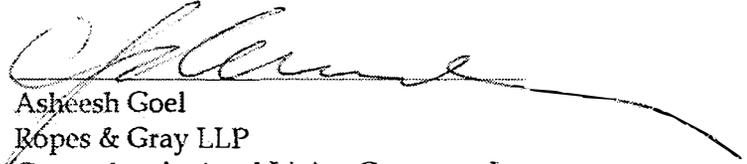
ROPES & GRAY LLP

to this agreement and will not disclose them to any third party, except to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities.

The Staff will not assert that ALC's production of the Confidential Materials to the Commission constitutes a waiver of the protection of the attorney work product doctrine, the attorney-client privilege, or any other privilege applicable as to any third party. The Staff agrees that production of the Confidential Materials provides the Staff with no additional grounds to subpoena testimony, documents or other privileged materials from ALC, although any such grounds that may exist apart from such production shall remain unaffected by this agreement.

The Staff's agreement to the terms of this letter is signified by your signature on the line provided below.

Sincerely,

  
Asheesh Goel  
Ropes & Gray LLP  
Counsel to Assisted Living Concepts, Inc.

Date:

AGREED AND ACCEPTED:  
United States Securities and Exchange Commission

By: 

Division of Enforcement

Date: 3/3/19

**MILBANK, TWEED, HADLEY & McCLOY LLP**

1 CHASE MANHATTAN PLAZA

NEW YORK, N.Y. 10005-1413

212-530-5000

FAX: 212-530-5219

Mark D. Villaverde  
E-MAIL: MVillaverde@milbank.com

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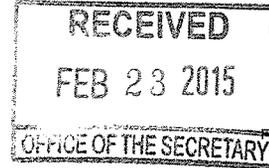
BEIJING  
8610-5969-2700  
FAX: 8610-5969-2707

HONG KONG  
852-2971-4888  
FAX: 852-2840-0792

SINGAPORE  
65-6428-2400  
FAX: 65-6428-2500

TOKYO  
813-5410-2801  
FAX: 813-5410-2891

SÃO PAULO  
55-11-3927-7700  
FAX: 55-11-3927-7777



February 20, 2015

**BY FEDEX**

Brent J. Fields, Secretary  
Office of the Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

RE: *In the Matter of Laurie Bebo*, AP File No. 3-16293

Dear Mr. Fields:

Enclosed for filing in the above-referenced matter please find an original and three copies of Milbank Tweed Hadley & McCloy LLP's Motion to Quash Non-Party Subpoena *Duces Tecum* Issued at the Request of Respondent Laurie Bebo.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark D. Villaverde". The signature is stylized with long, thin vertical strokes for the letters 'M' and 'V'.

Mark D. Villaverde

cc: Benjamin J. Hanauer  
The Honorable Cameron Elliot (*via email*)  
Mark A. Cameli  
Ryan S. Stippich  
Patrick S. Coffey